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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals disregarded this Court's decisions in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980); and *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); in ruling that the Economic Stabilization Act of 1970 impliedly repealed petitioner's Tucker Act remedies against the Department of the Interior for breach of contract, monies unlawfully exacted and retained, and violations of federal statutes and regulations, in the absence of any expression of Congressional intent to withdraw such Tucker Act remedies.

2. Whether the court of appeals disregarded this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), by ruling that petitioner's action under the Tucker Act for breach of contract, money unlawfully exacted and retained, and violation of federal statutes and regulations is barred because the federal statute creating the substantive right (independent of the contract and exaction claims) does not itself contain an explicit waiver of sovereign immunity.

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UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Lunday-Thagard Company * ("Lunday-Thagard") hereby petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States ("TECA") in this case.

OPINIONS BELOW

Neither the opinion of the Temporary Emergency Court of Appeals (App. A) nor the opinions of the United States District Court of the Western District of Louisiana (App. B and App. C) have yet been reported.

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* World Oil Company is the parent of petitioner Lunday-Thagard Company. World Oil Company is also the parent of Pan Pacific Petroleum Company, Sunland Refining Corporation, and World Oil Marketing Company.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1985. By order dated August 7, 1985, the Chief Justice extended the time within which this petition may be filed to and including September 25, 1985. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970 ("ESA") as amended, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. § 1346, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court of:
>
> . . .
>
> (b) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

Section 210 of the Economic Stabilization Act provides, in pertinent part:

> Suits for Damages or Other Relief.
>
> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

Section 211 of the Economic Stabilization Act provides, in pertinent part:

> (a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy . . . .

10 C.F.R. § 212.52 (1980) provided, in pertinent part:

> The prices charged for any sale, lease or lease-sale of a covered product by any Federal Department, agency, or other instrumentality, including any wholly-owned Government corporation as defined in the Government Corporation Control Act of 1945, as amended, and by state and local governments are subject to the price regulations of this part . . . .

STATEMENT OF THE CASE

The questions presented here concern the extent of the federal government's immunity from a civil damage action arising out of its activities as a seller of crude oil. For over a decade, the Department of Energy ("DOE") and its predecessor agencies, through prosecution of numerous administrative and judicial enforcement proceedings, have strictly enforced the regulations governing prices that private parties were permitted to charge in sales of crude oil and refined petroleum products. For example, a $2 billion judgment secured by the government against Exxon Corporation for alleged violations of DOE regulations governing sales of crude oil was recently affirmed by the Temporary Emergency Court of Appeals. *See United States v. Exxon Corporation*, Nos. DC-91 through DC-100 (TECA, July 1, 1985). In addition, Section 210 of the Economic Stabilization Act ("ESA") authorizes "[a]ny person suffering legal wrong" as a result of a violation of DOE's price control regulations to bring a civil damage action for recovery of overcharges in a district court of the United States.

This action was brought by Lunday-Thagard against the United States Department of the Interior for recovery of overcharges resulting from Interior's sale of crude oil to Lunday-Thagard at prices in excess of those permitted by DOE's regulations. It is undisputed that DOE's price control regulations were as applicable to federal agencies as they were to private parties. Moreover, Interior's crude oil sales contracts with petitioner expressly provided that Interior would comply with DOE price control regulations. Nevertheless, while recognizing that Lunday-Thagard "presents a claim of injury which on its face appears to call for a remedy," the court below concluded that Interior is immune from a civil damage action, brought under Section 210 of the ESA and under the Tucker Act, to recover approximately $6 million in overcharges being retained by the United States.

Background

Lunday-Thagard, a small independent refiner, purchased crude oil from Interior during the period April 1973 through January 1981.[1] These purchases were made under several contracts, each providing that the price Lunday-Thagard was to pay Interior would not exceed the maximum allowable price permitted under the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 *et seq.* The EPAA required the President (or his designee) to promulgate regulations governing the maximum price that could be paid for crude oil and refined petroleum products. In addition, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq., and 10 C.F.R. § 212.52 expressly provided that crude oil

[1] Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 et. seq., and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et. seq., the Secretary of the Interior is authorized to grant oil and gas leases on federally owned or controlled lands. The Secretary may take royalties accruing under the leases "in kind" and may sell the oil to small independent refiners, such as Lunday-Thagard.

sales by Interior were subject to the DOE price control regulations.

Section 210 of the ESA provides a right of action for recovery of any overcharges incurred in purchases of crude oil and refined products "without regard to the amount in controversy." Section 211 of the ESA provides exclusive jurisdiction in the district courts over "cases or controversies arising under this title . . . notwithstanding the amount in controversy. . . ." In addition, Section 23(a)(1) of OCSLA, 43 U.S.C. § 1349(a)(1), authorizes civil actions against "any person, including the United States, and any other government instrumentality or agency . . . for any alleged violations of any provision of this subchapter . . ."

Proceedings in the district court

Lunday-Thagard brought this action, pursuant to the Tucker Act, Section 210 of the ESA, and OCSLA, alleging that Interior violated both the DOE regulations and the contracts incorporating those regulations, and seeking the return of approximately $6 million dollars in overcharges being retained by Interior. The action was brought in district court, and not the Claims Court, because the ESA confers exclusive jurisdiction on district courts to consider controversies concerning the DOE regulations "without regard to the amount in controversy," thereby apparently waiving the Tucker Act's $10,000 limitation on actions brought in district court. Such a waiver is consistent with ensuring that all appeals in cases arising under the EPAA are decided by TECA, as provided in Section 211 of the ESA.

The government moved to dismiss Lunday-Thagard's complaint on the ground that the action was barred both by a one-year Louisiana statute of limitations and by sovereign immunity. The district court dismissed the complaint as time barred, holding that the one-year Louisiana Statute of limitations applied to this action, not 28 U.S.C.

§ 2401(a), which provides a six year limitation period for "every civil action commenced against the United States . . . ." (App. B, C). In dismissing the complaint, the district court did not address the sovereign immunity issue.

Proceedings in the Court of Appeals

On appeal, the government did not seriously press the statute of limitations issue, and the Temporary Emergency Court of Appeals ("TECA") did not address it. Rather, the government urged affirmance on the ground that the action was barred by the doctrine of sovereign immunity. In response, Lunday-Thagard asserted that sovereign immunity did not bar claims for recovery of money paid to (and unlawfully retained by) the government, for breach of contract, and for violation of federal statutes and federal regulations because such claims are squarely within the waiver of sovereign immunity provided by the Tucker Act, 28 U.S.C. §§ 1346, 1491. TECA nevertheless ruled that the action was barred by sovereign immunity.

In its decision, TECA acknowledged that "[e]ach contract provided that the price to be paid would be the highest allowable by the EPAA" (App. A at 2a), and acknowledged that "plaintiff claimed that . . . these alleged violations . . . constituted a breach of contract" (App. A at 3a). Because actions for breach of contract are unquestionably within the scope of the Tucker Act, this should have ended the inquiry regarding sovereign immunity. TECA held, however, that because the ESA provides exclusive district court jurisdiction for claims arising under the EPAA regulations, the ESA has repealed all Tucker Act remedies notwithstanding the absence of any expression of Congressional intent to repeal such remedies, either in the text of the ESA or in its legislative history:

> The claim here does not fall within the Tucker Act because Section 211 [of the ESA] places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim for over $10,000 in the Court of Claims.

(App. A at 7a). In so ruling, and thus implicitly finding the ESA to be incompatible with the Tucker Act, TECA failed to address the ESA's grant of district court jurisdiction "without regard to the amount in controversy," statutory language long held to waive the Tucker Act's $10,000 limitation on actions brought in district court.

With respect to Lunday-Thagard's Tucker Act claim for damages resulting from the government's violations of the EPAA and regulations promulgated thereunder, TECA disregarded this Court's ruling in *United States v. Mitchell*, 463 U.S. 206 (1983), stating:

> Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act . . . is to permit suit against the United States, and it spells out that permission in specific terms.

(App. A at 7a). TECA thereupon sought to determine whether any statute in addition to the Tucker Act expressly waived sovereign immunity. TECA determined that none did, stating that "[n]owhere in Section 210 which governs remedies . . . do we find any express waiver [of sovereign immunity]" (App. A at 4a).

Paradoxically, however, after going out of its way to preclude every remedy available, including transfer to the Claims Court in lieu of dismissal, and in the process going into conflict with four recent decisions of this Court, TECA noted:

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

(App. A at 8a).

REASONS FOR GRANTING THE WRIT

This is a case in which the United States Department of the Interior sold oil to a small, independent oil refiner at prices in excess of the price ceiling established by the parties' express contract and by federal law. When the independent refiner brought suit to recover these overcharges, the Temporary Emergency Court of Appeals held that the suit was barred by the doctrine of sovereign immunity, notwithstanding the fact that the Tucker Act waives sovereign immunity for all contract claims against the government. TECA also held that while the Department of the Interior was required to comply with the price limits imposed by the EPAA, if it exceeded those price limits it could keep the resulting overcharges, because the ESA does not contain a waiver of sovereign immunity in addition to that contained in the Tucker Act.

The Department of Interior has asserted, and Lunday-Thagard does not deny, that the totality of parallel overcharge claims by other small refiners exceed $1,000,000,000.[2] The effect of the lower court's decision is to wipe out all these claims and to permit the Department of the Interior to retain the billion dollars it obtained from private parties in direct violation of its contractual obligations and in direct violation of federal law.

TECA's decision is grounded on two demonstrably wrong—and dangerous—propositions:

(1) When Congress gave the federal district courts jurisdiction over all EPAA claims, by implication Congress was repealing the Tucker Act's waiver of sovereign immunity for breach of contract claims involving any interpretation of EPAA; and

(2) The Tucker Act waiver of sovereign immunity for claims brought under federal law does not apply to

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[2] *See Department of the Interior*, Energy Mgmt. (CCH) 12 DOE ¶ 81,012 at 82,567 (1984).

EPAA claims because neither the EPAA nor the ESA contains a separate waiver of sovereign immunity.

In so ruling, TECA has gone into direct conflict with numerous decisions of this Court, the Federal Circuit, the Claims Court, as well as all six district court rulings on motions to dismiss similar actions brought by other small refiners against Interior in connection with price control violations.

The doctrine of sovereign immunity was never intended to permit agencies of the United States to reap a windfall in commercial transactions by violating statutory, regulatory and contractual obligations with impunity. Rather, the doctrine was intended to prevent litigation from interfering with essential governmental activities. *United States v. Lee*, 106 U.S. 196 (1882); *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868). For this reason, the doctrine has never barred an action to recover one's own money that has been wrongfully exacted or retained. *See Bank of the United States v. Bank of Washington*, 31 U.S. (6 Pet.) 8 (1832). In this action, Lunday-Thagard is not seeking an award of the taxpayer's money from the Treasury. Rather, Lunday-Thagard is simply seeking the return of its own money that has been wrongfully exacted by means of a breach of contract and violations of federal law.

The Department of the Interior engages in numerous commercial transactions with private parties through its leases of federal lands to permit recovery of oil, oil shale, gas, uranium, timber, coal, phosphate, sodium, and potassium, and through its sale of these products. *See* 30 U.S.C. §§ 181, 351, 601. The decision in this case threatens to immunize Interior from any liability arising out of these commercial transactions.[3]

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[3] Indeed, Interior has already urged a district court to dismiss an action for refund of royalty overpayments, brought against

I. The decision below conflicts with recent decisions of this Court holding that later enacted legislation cannot implicitly repeal Tucker Act Remedies

The terms of the relevant contracts required Interior to adhere to the Department of Energy's price control regulations in the prices it charged Lunday-Thagard for crude oil. Accordingly, independent of any claims for violation of those regulations, Lunday-Thagard has claims for breach of contract and for the return of money unlawfully retained by the United States. These types of claims are ones that unquestionably fall squarely within the scope of the Tucker Act. Even before this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*"Mitchell II"*), there was no dispute that the Tucker Act waived sovereign immunity for breach of contract and unlawful exaction claims. *United States v. Testan*, 424 U.S. 392, 401-02 (1976); *Eastport Steamship Corporation v. United States*, 372 F.2d 1002, 1007-8 (Ct. Cl. 1967). Indeed, in the Brief for the United States filed on behalf of the Department of the Interior in *Mitchell II* (No. 81-1748), the government expressly conceded that a Tucker Act waiver of sovereign immunity "is effective whenever an independent basis for recovery of damages exists, be it a contract [or] the government's retention of funds owned by the claimant . . . ." Brief at 19. *See also, id.* at 8, 24, 30. This was emphatically reaffirmed by this Court's decision in *Mitchell II*:

> The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." . . . The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in contract is viewed as perhaps "the

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Interior by a lessee of a federal gas lease, on the basis of TECA's decision in the instant case. *See* Memorandum in Support of Defendant's Motion to Dismiss in Mesa Petroleum Co. v. United States Department of the Interior, Civil No. 84-1967-LC (W.D.La.) filed September 9, 1985 (App. D at 28a-29a).

> widest and most unequivocal waiver of federal immunity from suit."

463 U.S. at 215. Accordingly, it is beyond dispute that sovereign immunity does not bar actions for breach of contract or actions in which " 'the Government has the citizen's money in its pocket' and the claim is 'to recover an illegal exaction made by officials of the Government,' " *Eastport Steamship Corporation, supra.*, 372 F.2d at 1008.

Notwithstanding Lunday-Thagard's claims for unlawful exaction and for breach of contract, as well as its claim for violation of federal statutes and regulations, TECA ruled that:

> [T]he claim here does not fall within the Tucker Act because Section 211 places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim over $10,000 in the Court of Claims.

(App. A at 7a). In so ruling, TECA ignored an interpretation of the two statutes which would render them consistent. Section 211 of the ESA confers jurisdiction upon the district courts "notwithstanding the amount in controversy," thus waiving the $10,000 limit on Tucker Act claims brought in district courts pursuant to 28 U.S.C. § 1346, and in the process, preserving TECA's exclusive appellate jurisdiction in such cases.

In other cases involving statutes providing for jurisdiction in the district courts "without regard to the amount in controversy," the lower courts have consistently held that such language waives the Tucker Act's $10,000 jurisdictional limitation for maintaining actions in the district courts. *Munoz v. Small Business Administration*, 644 F.2d 1361 (9th Cir. 1981); *Mar v. Kleppe*, 520 F.2d 867 (10th Cir. 1975); *Robinson v. United States*, 551 F. Supp. 1120 (M.D.La. 1982); *Selected Risks Insurance Company v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976).

Thus, although there is no inconsistency between the ESA and the Tucker Act, and in spite of the fact that neither the ESA nor its legislative history reflects any Congressional intent to repeal Tucker Act remedies, TECA has ruled that the later enacted ESA has implicitly repealed Lunday-Thagard's Tucker Act remedy. In so ruling, TECA has gone into conflict with three recent decisions of this Court.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), this Court considered the question of whether the Regional Rail Reorganization Act of 1973 withdrew a Tucker Act remedy. That case, like this case, involved "emergency" legislation which provided for the "impaneling of [a] Special Court and the consolidation before it of 'all judicial proceedings with respect to the final system plan.'" 419 U.S. at 127. Moreover, there, as here, nothing on the face of the statute indicated that a Tucker Act remedy was intended to be withdrawn, and the Court was unable to find anything in the legislative history to support such a withdrawal. "The most that can be said is that the Rail Act is ambiguous on the question." 419 U.S. at 133. In such circumstances, this Court held that a later enacted statute will not be construed as wholly or even partially amending or repealing a prior one unless the two statutes cannot be reconciled. 419 U.S. at 134. As we have just demonstrated, the ESA can easily be reconciled with the Tucker Act. Moreover, this Court's decision in the *Regional Rail* cases also concluded that there would be grave doubts regarding the constitutionality of the Rail Act if it were read as withdrawing a Tucker Act remedy for injuries not compensated by the Rail Act itself. *Id.* Obviously, the same can be said of the ESA.

Similarly, in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), this Court refused to find that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") implicitly repealed Tucker Act remedies. Reiterating the

principles articulated in the *Regional Rail Reorganizations Act Cases*, the Court found no discussion in FIFRA, or its legislative history, "of the interaction between FIFRA and the Tucker Act" 104 S. Ct. at 2881. Further, this Court found the two statutes to be "capable of coexistence." *Id.* Accordingly, both were regarded as effective.

Finally, in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), this Court ruled that the exemption from tort liability under the Federal Tort Claims Act for claims arising from the detention of merchandise by customs officers does not preclude an action under the Tucker Act for breach of an implied-in-fact contract of bailment. The Court reasoned that in enacting the exemption from tort liability, Congress expressed no intent to disturb existing Tucker Act remedies.

Thus, where, as here, the Tucker Act and another statute "are 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Regional Rail Reorganization Act Cases*, 419 U.S. at 133-34; *Ruckelshaus v. Monsanto*, 104 S. Ct. at 2881.

Finally, at the very least, even if it is determined that Lunday-Thagard's Tucker Act claims in excess of $10,000 may not be brought in district court, the action should be transferred to the Claims Court pursuant to 28 U.S.C. § 1631. Neither Lunday-Thagard's contract claim nor its claim for unlawful exaction arises directly under the EPAA. Accordingly, even if an action for violation of EPAA regulations may not be maintained under the Tucker Act, Lunday-Thagard's claim for breach of contract and for unlawful exaction are unquestionably Tucker Act claims. There is no conceivable bar to the transfer of Lunday-Thagard's Tucker Act claims to the Claims Court. Absent such a transfer, a holding that the ESA has withdrawn a Tucker Act remedy leaves Lunday-Thagard with no means whatsoever for recover-

ing the approximately $6 million of its money being unlawfully withheld by the United States. As TECA noted:

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

(App. A at 8a). This conclusion places the constitutionality of the ESA in serious doubt, thus violating the "canon of construction that . . . when a statute is ambiguous, 'construction should go in the direction of constitutional policy.'" *Regional Rail Reorganization Act Cases*, 419 U.S. at 134. It is submitted, however, that Congress has already provided relief, and that relief has been provided in the Tucker Act.

II. The decision below conflicts with this Court's decision in *Mitchell II*, and with decisions of the Federal Circuit and the Claims Court construing *Mitchell II*, that a statute or regulation relied upon as the substantive source of a Tucker Act claim need not itself provide an explicit waiver of sovereign immunity

TECA's decision threatens to reopen a controversy this Court put to rest in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). In *Mitchell II*, also an action brought against the Interior Department, this Court held that the Tucker Act itself provides the necessary waiver of sovereign immunity for claims based upon alleged violations of federal statutes and regulations and that "the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218-219. Thus, in actions based upon alleged violations of federal statutes and regulations that would be cognizable under the Tucker Act, the proper inquiry is "whether the source of substantive law can fairly be interpreted as mandating

compensation by the Federal Government for the damages sustained." 463 U.S. at 218.

TECA, however, disregarded this decision stating:

> Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act . . . is to permit suit against the United States, and it spells out that permission in specific terms. The EPAA merely speaks of "persons" who may sue or be sued.

(App. A at 7a). At the outset, neither the EPAA nor the ESA speaks of " 'persons' who may sue or be sued." In any event, TECA concluded that Lunday-Thagard's action was barred by sovereign immunity because "[n]owhere in Section 210 which governs remedies . . . do we find any express waiver." (App. A at 4a).

Even construing TECA's decision as one attempting to determine whether the ESA "can fairly be interpreted as mandating compensation," TECA's ruling is in conflict with *Mitchell II*, and with lower court rulings construing *Mitchell II*. TECA limited its inquiry to whether the ESA *expressly* mandates compensation by the United States, a standard rejected by this Court in *Mitchell II* as too stringent:

> Because the Tucker Act supplies a waiver of sovereign immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, *nor need they be construed in the manner appropriate to waivers of sovereign immunity.*

463 U.S. at 218-219 (emphasis added). *See also Short v. United States*, 719 F.2d 1133, 1135 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 3545 (1984). The Claims Court has read *Mitchell II* as holding that "the substantive right to recover money damages need not be express, but may be implied." *Anderson v. United States*, 5 Cl. Ct. 573, 577 (1984), *aff'd*, 764 F.2d 849 (Fed. Cir. 1985). In *Anderson*, the claims court went on to state:

> Although *Mitchell II* does not provide specific guidelines for implying a right to monetary damages in any particular case, the Court's reasoning in that decision, including its re-interpretation of *Testan* and *Mitchell I* can reasonably be analyzed as follows:
>
> The Constitution, a statute, or a regulation should be "fairly interpreted as mandating compensation" when
>
> (1) A right to a benefit is thereby conferred;
>
> (2) The benefit conferred is economic in nature;
>
> (3) The Government breaches its duty to confer that benefit.

5 Cl. Ct. at 577. We submit that this is the correct interpretation of *Mitchell II*. Indeed, *Mitchell II* itself sought to clarify the law regarding waivers of sovereign immunity under the Tucker Act in light of "isolated language" in *Testan* and *Mitchell I*. *See* 463 U.S. at 216. TECA's decision in this case threatens to reopen the very issue that this Court sought to settle in *Mitchell II*.

Finally, under the standards announced in *Mitchell II*, and the cases following it, the ESA and the EPAA, fairly read, *do* mandate compensation. Section 210 of the ESA provides a right of action for money damages by "[a]ny person suffering legal wrong because of any act or practice arising out of this title . . . ." The United States and its agencies were expressly made subject to the Department of Energy's Mandatory Petroleum Price Regulations, which were issued under authority of the EPAA, and which incorporated Section 210 of the ESA by reference. 15 U.S.C. § 754, 12 U.S.C. § 1904 note. *See Mohawk Petroleum Corp. v. Department of the Navy*, 521 F.2d 1394 (TECA 1975); 10 C.F.R. § 212.52. Interior was explicitly made subject to the EPAA regulations, and was made subject to civil actions for violations of those regulations, by 1978 amendments to OCSLA. 43

U.S.C. §§ 1349(a)(1), 1353(b)(1), (e)(1). Thus, Section 210, which provides a damage remedy for violations of price control regulations which are expressly applicable to agencies of the United States, unquestionably provides a damage remedy against Interior in this case.[4]

Significantly, every district court that has considered the question of Interior's immunity from damage actions arising out of its sale of crude oil has concluded that Interior is not immune. *See Howell Corporation v. United States Department of the Interior*, No. 84-5153 (E.D. La. 1985); *Wesreco, Inc. v. Department of the Interior*, No. 84-0126 (D. Utah 1985); *Tipperary Refining Co. v. Department of the Interior*, No. MO-84-CA-05 (W.D. Tex. 1985); *Glenrock Refinery, Inc. v. Department of the Interior*, No. C84-264B (D. Wyo. 1984); *Young Refining Corp. v. Department of the Interior*, No. 82-2048 (E.D. La. 1983); *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297 (D. Wyo. 1982).[5]

The only court to find that the United States is immune from liability for crude oil overcharges is TECA. Unfortunately, however, TECA is the court of last resort in all of these cases. As a result, if TECA's decision is permitted to stand, all pending cases likely will be dismissed.

In sum, the ESA is both perfectly consistent with the Tucker Act and, fairly read, mandates compensation by the United States in the circumstances of this action. There is no reason why Lunday-Thagard should be de-

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[4] Indeed, in 1982, the Department of the Interior proposed legislation which would have retroactively relieved it from liability for its violations of the DOE's Mandatory Petroleum Price Regulations. S. Rep. 512, 97th Cong., 2d Sess. 41 (1982). This amnesty provision was proposed after the expiration of price controls, when the only kind of action available was one for damages, injunctive relief having been rendered meaningless by decontrol. Congress refused to enact the Interior amnesty provision. *Id.* at 20.

[5] Copies of unreported decisions have been lodged with the Court.

prived of its day in court and its opportunity to attempt to recover the money unlawfully retained by the United States as a result of its breach of contract and violation of applicable statutes and regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. DONOHOE, P.C.
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Dated: September 24, 1985

APPENDICES



APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-115

LUNDAY-THAGARD COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellee.

(Argued June 11, 1985 Decided July 16, 1985)

Judgment Entered: July 26, 1985

DAVID A. DONOHOE, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., with whom Jerry E. Rothrock and Harry R. Silver, of the same firm, were on the brief for Plaintiff-Appellant.

THOMAS MILLET, Attorney, United States Department of Justice, Civil Division, Washington, D.C., with whom Richard K. Willard, Acting Assistant Attorney General, and Stephen E. Hart, Attorney, Department of Justice, Civil Division, Washington, D.C., were on the brief for Defendant-Appellee.

William W. DePaulo and Richard H. Streeter, Wheeler & Wheeler, Washington, D.C., were on the brief for Amicus Curiae Howell Corporation.

John R. Cope, Darci L. Rock and Mary Caroline Parker, Bracewell & Patterson, Washington, D.C., were on the brief for Amicus Curiae Laketon Asphalt Refining, Inc.

Before METZNER, PECK and POINTER, Judges.

METZNER, Judge.

Plaintiff Lunday-Thagard Company ("Lunday-Thagard") appeals from a judgment of the Western District

of Louisiana (Vernon, J.) dismissing as time-barred its action for overcharges. Section 210 of the Emergency Stabilization Act ("ESA"), 12 U.S.C. § 1904 Note, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754. The claim arises from the sale of crude oil by defendant United States Department of Interior ("DOI"). The action also asserts a claim for breach of contract. DOI seeks affirmance of the judgment and renews its argument, pressed below, that the district court lacked jurisdiction of the action because Congress has not waived sovereign immunity.

Plaintiff, a small independent refiner, purchased federal royalty crude oil [1] from the United States Geological Survey, a sub-agency of the DOI, between June 1976 and January 1981 pursuant to several contracts. Each contract provided that the price to be paid would be the highest allowable by EPAA. During that period applicable EPAA regulations established the well-known two-tier price structure for the sale of domestic crude oil. 10 C.F.R. Part 212, Subpart D. *See* 39 Fed. Reg. 1924 (Jan. 15, 1974); 41 Fed. Reg. 4931 (Feb. 3, 1976). Under this structure the regulations required each seller to certify to its purchasers, in writing within two months of a sale, the amount and kind of oil it had sold in each price category. 10 C.F.R. § 212.131(a)(6). If certification was not timely or was not in proper form, the subject oil was deemed to be "old crude" and could be sold lawfully only at the lower-tier price. 10 C.F.R. §§ 212.72 and 212.73.

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[1] Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 et seq., and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., the Secretary of the Interior is authorized to grant oil and gas leases on federally owned or controlled lands. The Secretary may take royalties accruing under the leases "in kind" and may sell the oil to defined classes of small independent refiners.

Plaintiff's complaint, which was filed in December 1983, alleges that DOI failed to properly certify the royalty crude oil it sold but nonetheless charged plaintiff the upper-tier price. Plaintiff's theory is that failure to properly certify, without regard to the propriety of the price charged, entitles it to claim that it was overcharged and entitled to a refund of approximately $6 million, and an additional $12 million for willful overcharging, under Section 210(b). *See* 10 C.F.R. §§ 212.72 and 212.73.

Plaintiff also alleges that DOI imposed administrative fees and surcharges on the contract price of the crude oil and failed to reimburse it for transportation payments made to third parties, all in violation of EPAA regulations. 10 C.F.R. § 212.74. Finally, plaintiff claims that each of these alleged violations also constituted a breach of contract.

Initially, the sovereign immunity issue must be addressed to determine whether subject matter jurisdiction exists in this case. *Department of Energy v. Hunt*, 734 F.2d 816, 826 (Temp. Emer. Ct. App. 1984). As the Supreme Court has time and again noted, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965 (1983).

The traditional doctrine of sovereign immunity holds that in the absence of express and unambiguous congressional consent, the United States is not subject to suit. *See United States v. King*, 395 U.S. 1, 4 (1969).

This claim for damages rests on alleged violations of the EPAA and the regulations implementing it, except for the relatively small claim seeking reimbursement for transportation payments. *Johnson Oil Co. v. Department of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Resolution of the EPAA claims is therefore governed by Sections 210 and 211 of the ESA. It is these

sections to which we must turn in order to determine whether Congress has waived sovereign immunity as to suits seeking changes under the EPAA. Nowhere in Section 210 which governs remedies (*see Griffin v. United States*, 537 F.2d 1130 (Temp. Emer. Ct. App.), *cert. denied*, 429 U.S. 919 (1976)), do we find any express waiver.

An argument has been made that an implied waiver can be found in Section 210(b) of the ESA, which provides that an action may be brought against any "person" who violates the overcharge provisions to recover up to treble damages. The validity of this argument depends on whether the government is considered a person. On several occasions it has been held that the government does not come within the definition of a "person." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). *See also United States v. Mine Workers*, 330 U.S. 258, 275 (1974).

It should also be noted that if it were intended by Congress to include the government within this provision, it would be unusual, and probably the first time, that treble damages were ever allowed against the United States. This makes it all the more obvious that Congress did not intend by implication to waive sovereign immunity in overcharge actions under Section 210.

It has also been argued that an implication of waiver may be found in a portion of legislative history which reads:

> "Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against the violator.
>
> This action is intended to be brought by private persons against other private persons. The Govern-

> ment will not bring such action nor be the subject of one." S. Rep. No. 92-507, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News, pp. 2283, 2291.

Even assuming that the second paragraph refers only to treble damage actions, this statement is a slender reed indeed on which to imply that it was Congress' intent to permit the government to be sued for single damages.

We find that *McCulloch Gas Processing Corporation v. Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712 (Temp. Emer. Ct. App.), *cert. denied*, 439 U.S. 831 (1978), controls this case. There, too, a plaintiff sought money damages against the United States. The court squarely held that Section 210 does not provide the plaintiff with a cause of action for damages against the United States, except in fifth amendment taking cases. *See Griffin v. United States, supra.* Judge Christensen in his concurrence in *McCulloch* specifically pointed out that neither Sections 210 nor 211 waived sovereign immunity, and further stated that "the limitation of the jurisdiction of the courts by § 211 to interlocutory relief in suits against the United States merely reemphasized the absence of any waiver of governmental immunity with reference to damages not constitutionally mandated." 577 F.2d at 718.

The decision in *McCulloch* appears to be at odds with the holding in *Mohawk Petroleum Corp. v. Department of the Navy*, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975), that federal agencies are subject to EPAA pricing regulations, and that the court was therefore empowered to issue an injunction requiring such compliance. However, it is clear, and the government has admitted on oral argument, that the issue of sovereign immunity was never raised in *Mohawk.*

After the decision in *McCulloch*, several district courts distinguished the holding in that case on the basis that

it was concerned solely with the government acting in a regulatory capacity. These district courts were concerned with damage suits against the government acting in a "commercial" capacity. *See Wesreco, Inc. v. Department of the Interior*, No. 84-0126, slip. op. (D. Utah April 12, 1985); *Tipperary Refining Co. v. Department of the Interior*, No. MO-84-CA-05 (W.D. Tex. Jan. 16, 1985); *Glenrock Refinery, Inc. v. Department of the Interior*, No. C84-264B (D. Wyo. Dec. 5, 1984); *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297 (D. Wyo. 1982).

The case of *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), clearly points out that there is no distinction between the regulatory and private functions of the government. The Court said:

> "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending on the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." (Footnote omitted.) *Id.* at 383-84.

Three of these district court cases (*Tipperary Refining Co., Glenrock Refinery, Inc.*, and *Wyoming Refining Co.*) implied a waiver after distinguishing *McCulloch* because it was concerned with government regulatory activity.

Wesreco, supra, and *Young Refining Corp. v. Department of the Interior*, No. 82-2048 (E.D. La. July 6, 1983), found a waiver of sovereign immunity on the theory that the decision in *Mitchell, supra*, dictated the existence of a waiver in EPAA cases. *Mitchell* said:

> "For the reasons set forth below, we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States,

> the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." (Footnote omitted.) 463 U.S. at 212.

Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1), is to permit suit against the United States, and it spells out that permission in specific terms. The EPAA merely speaks of "persons" who may sue or be sued.

The claim here does not fall within the Tucker Act because Section 211 places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim for over $10,000 in the Court of Claims. The Court of Claims has held that in view of Section 211, it has no jurisdiction under the Tucker Act to review actions under Section 210. *The Poole & Kent Co.*, 214 Ct. Cl. 836 (1977).

Finally, there is no basis to the argument that Section 211 is a specific enactment which creates an exception to the jurisdictional amount limitation of over $10,000 in the Tucker Act. This argument was presented to this court in *McCulloch*, 577 F.2d at 715-16 and rejected at that time.

It is argued that since DOI has litigated and lost the sovereign immunity issue in the five district court cases,[2] it is collaterally estopped from raising the issue here. This contention is without merit. The Supreme Court has recently made it clear that the nonmutual offensive use of collateral estoppel sanction in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), is not applicable in suits against the United States. *United States v. Mendoza*, —— U.S. ——, 104 S.Ct. 568 (1984).

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[2] The government settled four of the five cases after losing the waiver issue in the district court. Only the last case (Wesreco) appears to be open.

The claim for damages based on transportation payments does not present an EPAA issue. It is a contract claim independent of any claim created by the EPAA and is not covered by the decision of this court that breach of contract claims going to violations of the EPAA are cognizable only as statutory claims. *Johnson Oil Co. v. Department of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982).

The complaint does not specify the amount sought to be recovered for such damage in this lawsuit. Recovery may be had in the district court if the amount is under $10,000. If not, the matter would have to be presented to the Court of Claims. This issue is remanded to the district court for resolution.

Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

The judgment is affirmed except that the issue of damages for transportation payments is remanded to the district court for resolution.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Feb. 4, 1985]

RULING ON MOTION FOR RECONSIDERATION

This matter comes before the Court on Plaintiff Lunday-Thagard Company's ("Lunday-Thagard" or the "Company") Motion for Reconsideration of our December 6th Ruling that its crude-oil overcharge action, brought under the private action provision of the Emergency Petroleum Allocation Act, has prescribed by the passing of the Louisiana Civil Code's one-year prescription period, Article 3536. We rejected Lunday-Thagard's call for application of Article 3544 because the Temporary Emergency Court of Appeals ("TECA") has held (at least implicitly) that ten-year limitations are "inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." *Johnson Oil Co. Inc. v. U.S. Dept. of Energy*, 690 F.2d 191, 196 (TECA 1982).

Now Lunday-Thagard would have us adopt the six-year limitation of 28 U.S.C. § 2401(a), for "civil ac-

tion[s] commenced against the United States" which do not sound in tort, even though it conceded before our Ruling that *Johnson, supra*, and *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 567 F.2d 984 (TECA 1977), "clearly indicate the inapplicability of 28 U.S.C. § 2401 (a) . . ., since they state unequivocally that no federal limitation period applies." Plaintiff's Brief in Opposition to Motion to Dismiss, at 36, n. 28. Ironically, the Company now reveres *Ashland, supra*, for its supposed holding that we can apply the most analogous state limitation to an overcharge action "only in the absence of a statutory limitation provided by Congress." Memorandum in Support of Motion for Reconsideration, at 5. Then it cites our recent Ruling in *Geyen v. Marsh* for the proposition that section 2401(a) is "jurisdictional" and thus its application mandatory, *see* 587 F.Supp. 539 (W.D.La. 1984), and quotes *Glenrock Refinery, Inc. v. United States Department of the Interior*, holding that section 2401(a) is "definitive . . . even though a shorter state or federal provision would apply to identical proceedings involving individual parties." No. C84-0264-B, Slip op. at 6 (D.Wyo. Dec. 5, 1984). Finally, Lunday-Thagard argues that our reliance upon *Johnson* is misplaced, because the defendants there were private parties and thus without the reach of section 2401(a).

As to *Johnson*, TECA's affirmation of national energy policy transcends the facts of that case. And neither *Ashland* nor *Geyen* addresses the issue before us: whether the courts can apply a general federal limitation that is wholly inconsistent with national policy. *Ashland* merely reaffirms the basic precept of interstitial lawmaking, that "[g]enerally in the absence of a statutory limitation provided by Congress, a federal court will apply the most analogous state [rather than the most analogous federal] law of limitations." 567 F.2d at 989. And in *Geyen, supra*, we held only that plaintiff's exhausting administrative remedies cannot toll section 2401(a).

Finally, we disagree with the court in *Glenrock Refinery, supra*, that section 2401(a) is "definitive." We cannot apply it to overcharge actions, no matter how dispositive we might find it in other contexts, because it it just as anathematic to our national goal of deregulating the oil industry as the ten-year limitation rejected in *Johnson*.

Accordingly, we DENY Lunday-Thagard's Motion for Reconsideration.

THUS DONE AND SIGNED this 4th day of February, 1985, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

VS.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Feb. 4, 1985]

JUDGMENT

For written reasons assigned this day;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Lunday-Thagard Company's Motion for Reconsideration be and it is hereby DENIED.

THUS DONE AND SIGNED this 4th day of February, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

[Filed Dec. 6, 1984]

FOR THE PLAINTIFF	Messrs. Jerry E. Rothrock Akin, Gump, Strauss, Hauer & Feld 1333 New Hampshire Avenue, N.W., Suite 400 Washington, D.C. 20036 A. Lane Plauche Plauche, Smith & Nieset P.O. Box 1705 Lake Charles, LA 70602
FOR THE DEFENDANT	Richard K. Willard Acting Assistant Attorney General Joseph S. Cage, Jr. United States Attorney Lawrence Moon Assistant U.S. Attorney Stephen E. Hart Thomas Millet Attorneys, Civil Division Department of Justice 10th & Penn. Ave., N.W. Washington, D.C. 20530

EARL E. VERON
United States District Judge

RULING ON MOTION TO DISMISS

A. Introduction

In December 1983, Plaintiff Lunday-Thagard Company ("Lunday-Thagard" or the "Company") brought this action seeking recovery of, and treble damages for, the "overcharges" allegedly collected by the Department of the Interior ("DOI") in the sale of crude oil to Lunday-Thagard from June 1976 through January 1981, in violation of the Department of Energy's ("DOE") Mandatory Price Regulations in effect during that period. The Company's suit is based upon section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754(a)(1), which incorporates the private action provision, section 210, of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904. The DOI would have us dismiss the suit for want of subject matter jurisdiction, arguing that Congress has not waived the United States' sovereign immunity for claims based upon section 210 of the ESA. Alternatively, the DOI seeks dismissal on the grounds that the suit has prescribed by the passing of one year under Article 3536 of the Louisiana Civil Code.

B. Facts

Between April 1973 and January 1981, the DOI entered into several contracts with Lunday-Thagard to supply it domestic crude oil, each incorporating the EPAA by reference. The EPAA empowered the President to allocate and price domestic crude in wake of the Arab Oil Embargo, *see* § 4(a) of the EPAA, and the DOE adopted a "two-tier" price ceiling to implement it: "old crude" carried a maximum price of $5.25 per barrel, but "new crude" could be sold for the then free-market price of

$14.00 per barrel. *See* 39 Fed. Reg. 1924 (Jan. 15, 1974); 41 Fed. Reg. 4931 (Feb. 3, 1976). The DOE also required producers to certify to customers in writing the amount of oil they purchased in each category, prohibited producers from collecting administrative fees or "surcharges" for certification, and instructed them to continue their long-standing practice of reimbursing refiners for transportation payments made to third parties. *See* 10 C.F.R. §§ 212.73, 212.74, and 212.131. All producers of domestic crude oil, including federal agencies, were subject to these Mandatory Pricing Regulations. *Mohawk Petroleum Corp. v. Department of Navy*, 521 F.2d 1394, 1395 (Temp. Emer. Ct. Apps. 1975). Lunday-Thagard complains that the DOI willfully failed to certify, either in timely fashion or in proper form, the oil it sold the Company after May 1976. This supposedly entitles the Company to treat all of that oil as "old crude," notwithstanding the Company's failure to allege that any portion was unqualified for the price category billed by the DOI. Lunday-Thagard calculates that it was "overcharged" nearly $6.08 million for that old crude, and $.11 million for administrative fees, "surcharges" and transportation charges. It now, as we note above, seeks to recover both its money and treble damages.

C. Analysis

We decide this motion upon the DOI's argument that Lunday-Thagard's suit has prescribed by the passing of one year. Neither the EPAA nor the ESA contains a statute of limitation, so the federal courts must apply the most analogous state limitation consistent with national energy policy to crude-oil overcharge actions. *Johnson Oil Co. Inc. v. U.S. Dept. of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. Apps. 1982) ("TECA"). The DOI characterizes this action as one for EPAA pricing violations rather than breach of contract, thus seeking to make the one-year prescription of Louisiana Civil Code Article 3536, which applies to actions "resulting from offenses

and quasi offenses," the applicable state limitation. The DOI seeks support in *Johnson, supra*, where the counterclaimant sought to recover crude oil overcharges on contracts requiring it to pay "the highest legal price," to wit, the maximum price permitted under the EPAA. TECA held that the "dominant claim" was for "violation of the pricing regulations," because "the elements necessary to prove a violation of the pricing regulations for overcharging must be proved to establish a breach of the parties' contract for exceeding the 'highest legal price'." 690 F.2d at 196. TECA then applied Wyoming's two-year limitation for "a liability created by federal statute" instead of its ten-year contract limitation.

Lunday-Thagard characterizes this case as a pure contract action, thus seeking to make the ten-year prescription of Article 3544, which applies to "all personal actions, except those before enumerated," the applicable limitation. At the very least, the Company would have us follow the bifurcated approach of *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 690 F.2d 984 (TECA 1982). In *Ashland*, TECA applied California's one-year limitation for "[a]n action upon a statute for a penalty or forfeiture" to plaintiff's claim seeking treble damages for intentional overcharges. But in its next breath, TECA applied the state's three-year limitation to plaintiff's claim for reimbursement of the overcharges. TECA reasoned that given "the complexity of the [DOE's] price regulations and the difficulty of determining compliance therewith," endorsing one-year limitations for actual damage claims would eviscerate the ESA's private action provision. 567 F.2d at 991.

Johnson's holding that in an overcharge action, the predominant claim is for EPAA pricing violations, prevents us from characterizing this action as a purely contractual one. The limitations available under Louisiana law, the one-year and ten-year prescriptions, also foreclose our use of *Ashland*'s bifurcated approach, because *Johnson* also held (at least implicitly) that ten-year limi-

tations are "inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." 690 F.2d at 197. Had Lunday-Thagard alleged substantial difficulties in detecting DOI pricing violations, we might have preferred, however unpleasant the choice, to offend national energy policy by applying the ten-year prescription to the Company's reimbursement claim than to eviscerate section 210 of the ESA by endorsing the one-year prescription. But in the absence of such allegations, we are forced to apply Article 3536's one-year prescription to Lunday-Thagard's entire suit. Accordingly, we GRANT the DOI's Motion to Dismiss the Complaint.

THUS DONE AND SIGNED this 6th day of December, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Vernon
EARL E. VERON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Dec. 6, 1984]

JUDGMENT

For written reasons assigned this day;

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant United States Department of the Interior's Motion to Dismiss Plaintiff Lunday-Thagard Company's Complaint be, and it is hereby, GRANTED.

THUS DONE AND SIGNED this 6th day of December, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil No. 84-1967 LC

MESA PETROLEUM CO.,
Plaintiff,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR,
Defendant and Third Party Plaintiff,

v.

PHILLIPS PETROLEUM CO.; AMOCO PRODUCTION CO. (USA); CANADIAN OCCIDENTAL OF CALIFORNIA, INC.; OXY PETROLEUM, INC.; PETRO-LEWIS CORP., ROWAN PETROLEUM INC.; TERRA RESOURCES, INC., OUINTANA PETROLEUM CORP. (O&G and OFFSHORE); DECALTA INTERNATIONAL CORP.; FIN-OIL/AMERICANA PETROFINA CO. OF TEXAS; HNG FOSSIL FUELS CO.,
Third Party Defendants,

and

MESA PETROLEUM CO.,
Cross Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S COUNTERCLAIM FOR INTERPLEADER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
STATEMENT OF FACTS

STATEMENT OF FACTS

Plaintiff Mesa Petroleum Company is one of thirteen co-lessees of four gas leases covering submerged lands located on the outer continental shelf off Texas and Louisiana. The terms of the leases, as well as the Outer Continental Shelf Lands Act * and corresponding regulations,** require co-lessees to pay royalties to the Minerals Management Service (MMS) of the Department of the Interior on the value of production of gas on the leases. All production on the four leases is commingled and removed from a single platform.

On November 19, 1981, Mesa submitted to the Metairie, Louisiana, MMS office an application for a refund of alleged royalty overpayments of $1,508,748.32. The MMS may refund royalty overpayments provided that the lessee complies with certain requirements.*** A review was performed by the MMS (Metairie) and a number of problems were identified which precluded a speedy resolution of the refund request. On January 26, 1983, the MMS (Metairie) informed Mesa by letter of some of the problems that that were being uncovered by the preliminary review. Mesa's Ex. 17. An examination of Mesa's refund request indicated that some of the co-lessees included in Mesa's refund request had failed to report the correct volumes taken, or had calculated quantities based on their assigned working interest percentages, which resulted in an underpayment of royalties. *Id.* In addition, the quantities reported by Mesa in its refund request did not reconcile with the quantities reported on the production reports submitted by the operator of the

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* 43 U.S.C. § 1331 *et seq.*

** 30 C.F.R. Parts 206, 210, 212, 218, and 250.

*** 43 U.S.C. § 1339; Solicitor Opinion M-36942, 88 Interior Decisions 1090 (Dec. 15, 1981).

leases, Aminoil.* Because Aminoil did not respond to the MMS' requests for an explanation of this difference; MMS informed Mesa that an audit would have to be conducted before any refunds could be approved. The letter also advised Mesa that the portion of its refund request that represented payments made between October 1978 and October 1979 would be denied because of the two year statute of limitations contained in section 10 of the OCSLA.**

On June 14, 1983, the MMS completed its preliminary review of the status of lease royalties and recommended that a portion of Mesa's refund request be denied as being beyond the two year statute of limitations in section 10. Mesa's Ex. 20. The MMS also advised Mesa that it was preliminarily recommending a refund of $886,444, finding $481,441 of Mesa's claimed overpayment to be invalid. The MMS made no determination with regard to the validity of Mesa's claim that it had overpaid by $1,508,748. Mesa's Ex. H. These figures were calculated by comparing the total lease sales figures as shown on forms submitted to the MMS and the total volumes sold as obtained from the Aminoil allocation schedules, with the total payments made on each lease. The MMS requested that Mesa concur or comment regarding this revised refund amount.

On August 17, 1983, Mesa provided the MMS with summaries of overpayments and underpayments for each individual co-lessee; Mesa's summaries showed that there was an overpayment on each of the four leases. However, the amounts of the overpayments were incorrect as Mesa had apparently failed to subtract the amounts disallowed by the two year statute of limitations and had, through

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* Aminoil U.S.A., Inc., now known as Phillips Petroleum Co., is the lease operator on each of the four leases. 30 C.F.R. 250.31.

** The authority of the Secretary to approve valid refund requests is limited to those filed within two years of royalty payment. 42 U.S.C. § 1339(a).

the use of improper pricing and misallocations, understated the royalty amounts due.

It was at this point that it became evident to the MMS that a detailed audit of the four leases would be necessary. This was due in large part to discrepancies in Mesa's figures, particularly when compared with information obtained from an ongoing audit of Aminoil by the Office of the Inspector General (OIG). This OIG audit uncovered payment errors such as untimely filings under section 102 of the Natural Gas Policy Act of 1978 which caused incorrect pricing, misallocations of commingled volumes among pricing categories, and the reporting of incorrect sales volumes and values. Def. Ex. A at 2; Mesa's Ex. C. These payment accounting errors occurred with respect to all four leases and were not unique to Mesa's submissions.

Accordingly, on August 31, 1983, the MMS (Houston)* informed Mesa that a detailed audit of each of the four leases would have to be conducted. Mesa's Ex. 24. This audit period eventually was extended to September 1983 because some of the lessees continued to make late payments on amounts due during the initial audit period, thus affecting audit calculations.

In July 1984, all co-lessees were sent a schedule of payments, based upon the monthly Reports of Sales and Royalties received by the MMS, for verification. Mesa's Ex. J. None of the co-lessees responded to MMS' request. Def. Supp. Ex. 1 at ¶ 7**

On July 27, 1984, Mesa filed its complaint with this court seeking injunctive relief, declaratory judgment, and a writ of mandamus.

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* MMS (Houston) has supervisory authority over MMS (Metairie).

** Def. Supp. Ex. refers to the supplemental exhibits filed concurrently with this memorandum.

On December 14, 1984, the MMS formally denied Mesa's refund request. Neither admitting nor denying that Mesa had paid more than its share of the royalties, MMS denied the request because the co-lessees as a whole owed money on the leases. "A refund to Mesa would create an even greater deficiency in the lease accounts." Mesa's Ex. I. Three days later, on December 17, the MMS issued a Demand Letter and Bill for Collection to Aminoil and the other co-lessees for royalty underpayments of $827,743.54. Mesa's Ex. J. This amount was based upon the monthly Reports of Sales and Royalties which had been submitted to the MMS. The co-lessees were advised that they were jointly liable for the royalty underpayments.

On December 28, 1984, in response to the denial of its refund request, Mesa filed a notice of appeal with the Interior Board of Land Appeals (IBLA). Mesa's Ex. K. On January 14, 1985, Mesa filed a "protective" notice of appeal from the December 17 demand letter to Aminoil. Mesa's Ex. L.

On January 22, 1985, Robert Parker, Revenue Accounting Manager of Aminoil, notified the MMS that Aminoil had reviewed its payment records in light of the information provided by the MMS in July 1984, and concluded that the MMS had understated Aminoil's payments in the December 17, 1984 Demand Letter by about two million dollars. Once again, the information provided by the co-lessees to the MMS and the OIG during the audit was insufficient and required additional work.

As a result of an agreement with Aminoil to assist the MMS in determining the status of the lease accounts, on January 24, 1985, the MMS rescinded the December 17, 1984 Demand Letter and Bill for Collection and returned Mesa's "protective" notice of appeal. Mesa's Ex. N.

On February 26, 1985, the MMS filed a motion for summary remand with the IBLA, requesting that the

appeal be remanded. Mesa's Ex. O. Such a remand was necessary to permit the MMS to reconsider Mesa's refund request in light of the new information submitted by Aminoil. On March 12, 1985, this motion was granted. Mesa's Ex. Q.

On March 20, 1985, Aminoil provided royalty calculations for each co-lessee on the four leases along with a payment schedule for each lessee. The calculations and payment schedules. covered the audit period August 1978 through September 1983. With this information, eleven of the thirteen co-lessees met on April 11 to discuss the audit and a resolution of the problem of royalty payments. The parties eventually agreed to resolve any payment differences with the MMS within 30 to 60 days and to notify Aminoil of the final payment amounts. New information was submitted to the MMS which again altered the balances on the four leases. This information was processed and new balances furnished to the co-lessees, who agreed to accept the data as correct. Def. Ex. A at 2.

Meanwhile, on April 9, 1985, Mesa filed a motion for partial summary judgment. On May 6, 1985, the MMS filed a motion to dismiss for lack of subject matter jurisdiction and opposed Mesa's motion. On May 15, 1985, plaintiff filed its reply memorandum. Two days later on May 17, 1985, a status conference was held in Lake Charles. From that status conference, this Court entered a Minute Order dated May 17, 1985, in which the MMS was ordered to submit to Congress by July 19, 1985, "a statement of any amount of overpayment by the lessee." This overpaid amount was to be paid into the registry of this Court by September 3, 1985.

On July 18, 1985, MMS sent a letter to lease operator Phillips setting forth the results of MMS's review of Phillips' revised royalty calculations for August 1978 through September 1983 for the four leases. The report revealed net overpayments on leases OSC-G-2421 and

2743 of $317,105.15 and $1,055,189.16 respectively.* As to lease 2421, the report indicated eight co-lessees had overpaid $747,840.37, while the remaining five co-lessees had underpaid $430,735.22. On lease 2743, four co-lessees had overpaid by $1,179,956.30 and eight co-lessees had underpaid by $124,767.20. Finally, as explained in the letter, not all of the claimed net overpayments had been approved by the MMS due to: (1) failure to retroactively adjust royalties upon approval of section 102 prices, (2) failure to add gathering allowances, and/or (3) improper allocation of commingled volumes. After the recalculation of disallowances, the MMS determined, pursuant to section 10, that royalties were overpaid in the amount of $317,105.15 on lease OCS-G 2421 and $899,801.34 on lease OCS-G 2743.** Additionally, on underpaid leases OCS-G 2557 and 3286, $7,182.32 and $158,678.12, respectively, was still owed by the co-lessees. On August 28, 1985, a check for $1,216,906.49 was issued to the Clerk of this Court.

Meanwhile, MMS tried to encourage the co-lessees to settle the overpayment/underpayment dispute among themselves, which would have permitted Mesa to recover the full amount of its overpaid royalties. On July 10, 1985, the MMS sent to each of the co-lessees a letter informing them that MMS (Houston) had forwarded to Phillips Petroleum Co. (formerly, Aminoil), the lease operator, revised royalty payment schedules. However, the letter cautioned the co-lessees that MMS "is not legally obligated to police the accounting among the var-

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* Net overpayments occur when the difference between the overpayment and underpayment amounts is greater than zero.

** These amounts were calculated using a wet Btu measurement as directed by FERC Order 399 (49 *Fed. Reg.* 19293) and *Interstate Nat'l Gas Ass'n of Am.* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983). Some of the co-lessees, including Mesa, have already received refunds from the MMS based upon Order 399. The MMS will avoid double refunding of royalty amounts by billing the overpaid co-lessees.

ious co-lessees." The letter also requested that the co-lessees show cause by August 15, 1985, why the underpaying co-lessees should not be ordered to reimburse the overpaying co-lessees. The responses from the co-lessees were most discouraging. Mesa, ironically, was the most vehemently opposed to this good faith attempt to resolve the problem. Def. Supp. Ex. 3.

MMS now seeks dismissal of this case for lack of subject matter jurisdiction, or in the alternative, counterclaim for interpleader of the co-lessees. In any event, Mesa's motion for partial summary judgment should be denied.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIM.

Plaintiff herein seeks a partial summary judgment which, if granted, would result in a money judgment against the Department of Interior for $1,508,756.32. As discussed in our earlier memorandum *, while plaintiff prays for this relief under the guise of an order certifying Mesa's refund request, the indisputable result of the order will be to require federal defendant to pay an amount of money. As such, Mesa is seeking a money judgment for which jurisdiction lies exclusively in the United States Claims Court. 28 U.S.C. § 1491(a)(1).

In essence plaintiff now argues that the Outer Continental Shelf Land Act's (OCSLA) jurisdictional provision, section 23, 43 U.S.C. § 1349(b), withdraws Tucker Act jurisdiction from the Claims Court. Mesa's Reply Memo at 15. Since the status conference in this matter, a new decision has been rendered which further clarifies the answer to this issue.

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* Federal defendant presented some argument regarding this Court's lack of jurisdiction in its earlier memorandum dated May 6, 1985. Def. May Memo. at 16-19. Accordingly, those arguments will not be repeated herein.

As the Court is aware, a plaintiff, in order to have his claim litigated on the merits, must establish both subject matter jurisdiction in the court in question as well as a waiver of sovereign immunity. The Tucker Act, 28 U.S.C. § 1491 is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Thus, before a court may hear a Tucker Act claim, it must first determine whether some federal statute or regulation can fairly be interpreted as mandating compensation by the federal government for the damage sustained. *Testan*, *supra*, 424 U.S. at 400; *United States* v. *Hopkins*, 427 U.S. 123, 128 (1976).

In the instant matter, a waiver of sovereign immunity off non-monetary actions can be found in sections 10 and 23 of the OCSLA, 43 U.S.C. §§ 1339 and 1349. *Cf. United States* v. *City of Kansas City*, 761 F.2d 605, —— (10th Cir. 1985); *Hahn* v. *United States*, 757 F.2d 581, 586 (3d Cir. 1985). Were plaintiff's claim in a amount less than $10,000 this provision would also serve to confer jurisdiction upon the district court to adjudicate this matter.

However, it is well established that when a Claims Court remedy exists and nonetheless suit is brought in district court for declaratory relief and money damages, then the district court should defer jurisdiction to the Claims Court. *Mathis* v. *Laird*, 483 F.2d 943, 943-944 (9th Cir. 1973); *Warner* v. *Cox*, 487 F.2d 1301, 1304-1305 (5th Cir. 1974). As noted in our May Memo. at 16, plaintiff's suit is essentially one to recover a sum of money. Plaintiff's claim for declaratory relief seeks that the court declare that it is entitled to the refund of a certain specified royalty overpayment amount.* Further,

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* Plaintiff's claim for an injunction relates to the "take or pay" issue, which plaintiff apparently concedes in not properly before this court for failure to exhaust administrative remedies, and thus

despite its protests to the contrary, plaintiff's lawsuit is not one of true mandamus nature. Not only is Mesa seeking to compel payment of a sum of money, Mesa also asks that the court make a *determination* that a specific sum of money is due Mesa for an alleged breach of a contract. Such falls within the clear jurisdiction of the Claims Court. *See Doko Farms* v. *United States*, 588 F.Supp. 867, 869 (N.D. Tex. 1984); *see also New Mexico* v. *Regan*, 745 F.2d 1322, 1323 (10th Cir. 1984), and discussion thereof in Def. May Memo. at 17-18.

Where, as here, "a plaintiff's prime objective is to obtain money from the federal government, the intermediate steps to get that money do not govern the character of the action" or detract from the monetary character of the relief sought. *Heart of the Valley Metro. Sewerage Dist.* v. *EPA*, 532 F.Supp. 314, 317 (E.D. Wisc. 1981). Therefore, a monetary claim cannot be disguised as a suit for injunctive, mandatory, or other non-monetary relief to evade the exclusive jurisdiction of the Claims Court under 28 U.S.C. § 1491. *Hahn* v. *United States*, *supra*, 757 F.2d at 588; *New Mexico* v. *Regan*, *supra*, 745 F.2d at 1320-1321; *Amalgamated Sugar Co.* v. *Bergland*, 664 F.2d 818, 823-824 (10th Cir. 1981); *Alamo Navajo School Bd.* v. *Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), *cert. denied*, 102 S.Ct. 2041 (1982). Mesa has attempted to use section 1349 of the OCSLA as an exception to the $10,000 limitation of the Tucker Act. However, an argument similar to Mesa's was rejected by the Fifth Circuit in the recent case of *Lunday-Thagard* v. *Dep't of the Interior*, No. 5-115 (T.E.C.A. July 26, 1985).

In *Lunday-Thagard*, the plaintiff argued that section 211 of the Emergency Petroleum Allocation Act (15 U.S.C. § 755, a similar statute to section 1349) authorized a claim for money damages against the Department

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is irrelevant to the motion for partial summary judgment. See Mesa's April Memo. at 4 n.1.

of the Interior. Citing *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas, Ltd.*, 577 F.2d 712 (T.E.C.A. 1970), the Fifth Circuit found that section 211 did not constitute the necessary waiver of governmental immunity for money damages and accordingly the district court lacked jurisdiction over Lunday-Thagard's claim. *Id.* at 718. Because subsections 1349(a) and (b)(1) make no waiver of sovereign immunity as to money damages, Mesa cannot now use this section as a basis for jurisdiction in this court.

That Congress did not intend to give the district courts jurisdiction over money claims such as Mesa's is further shown by the language of section 1349(b)(2), which makes specific reference to money damages for personal injury claims.

Such an interpretation consistent with the 1978 amendments to the OCSLA, which altered the wording of 43 U.S.C. § 1349(b)(1), which stated that "[t]he United States district courts shall have original jurisdiction * * *", by *deleting* the word "original." Clearly it would appear Congress did not intend in enacting section 23 to divest the Claims Court of its long established jurisdiction.

For the foregoing reasons, federal defendant submits that neither of plaintiff's claims are properly before this court. First, plaintiff's claim regarding "take or pay" receipts should be dismissed for failure to exhaust administrative remedies. Secondly, this court lacks subject matter jurisdiction to award Mesa its claimed royalty overpayments.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT DEFENDANT'S MOTION TO FILE ITS COUNTERCLAIM FOR INTERPLEADER AND FEDERAL DEFENDANT SHOULD THEREAFTER BE DISMISSED FROM THE ACTION AS A DISINTERESTED SHAREHOLDER.

Rule 22 of the Federal Rules of Civil Procedure provides that a defendant may join to an action parties having claims such that the assertion of their claims may expose the defendant to to double or multiple liability. Thus, the purpose of interpleader is to compel potential claimants to resolve what essentially is a dispute among themselves, without "embroiling the stakeholder in the litigation over the merits of the respective claims" and thereby protecting against double or multiple liability and avoiding the vexation of multiple lawsuits.* *Lummis* v. *White*, 629 F.2d 397, 399-400 (5th Cir. 1980), *on remand*, 686 F.2d 225 (1981); *Cramer* v. *Phoenix Mut. Life Ins. Co.*, 91 F.2d 141, 146 (8th Cir. 1937), *cert. denied*, 302 U.S. 739; *Pacific Indem. Co.* v. *Marceaux*, 263 F.Supp. 892, 893 (W.D. La. 1966); *United States* v. *Am. Film Inst.*, 79 F.R.D. 374, 376-377 (D.D.C. 1978); Wright & Miller, 7 *Federal Prac. & Proc.* 362.

Here the MMS has deposited into the registry of the court the maximum amount of its refund obligation on the two overpaid leases, yet faces potential claims in excess of that amount from eleven different companies. Further, the potential for claims is not limited to just the overpaid leases (Nos. 2421 and 2743), but also ex-

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* 28 U.S.C. § 1335(a) also provides a remedy in interpleader. The major difference between Rule 22 and the statute as applied in this case is that under Rule 22, the stakeholder need not deposit the amount in dispute into the registry of the court nor admit liability to any of the claimants. We have chosen Rule 22 because it is not known whether Mesa concurs in our total overpayment amount of $1,216,906.49.

ists as to the underpaid leases (Nos. 2557 and 3286) because on each of the four leases certain co-lessees have overpaid. Clearly to grant federal defendant's motion for interpleader would service the purposes of interpleader by avoiding duplicative litigation and resolving all questions of liability in one proceeding. *Zelen* v. *Second New Haven Bank*, 454 F.Supp. 1359, 1365 (D.C. Conn. 1978). It is clear that in this matter the potential for "double or multiple diability" exists in that Mesa's co-lessees who have overpaid royalties also would have the right to a refund under section 10, 43 U.S.C. § 1339(a), should Mesa prevail with its novel accounting theory.

For example, on lease OCS-G2421, lessees Amoco, Canadian Occidential, Oxy Petroleum, Petro-Lewis, Rowan, Quintana O&G, and DeCalta have all overpaid their royalties by $178,811.78, $18,871.97, $2,318.39, $164,502.66, $2,913.12, $1,1,239.30 and $68,412.01, respectively. The MMS has determined that $317,105.15 is due to be refunded to the lessees on lease OCS-G 2421. However, only Mesa has filed suit to recover the overpaid amounts. Were the court to award Mesa all of the overpaid amount, the MMS would then be vulnerable to suit by each of the other overpaying leases for what would, in reality, have already been refunded to Mesa.* Further, even if Mesa were awarded only part of the total amount in the registry of the Court, the MMS would still be exposed to future lawsuits in which Mesa's co-lessees might dispute and successfully prove that they were entitled to amounts different from those provided by the MMS in this litigation.

Such certainly establishes a reasonable and bona fide likelihood of exposure to multiply liability and the vexation of conflicting claims on the overpaid amounts. *See Am. Fidelity Fire Ins. Co.* v. *Construcciones Werl, Inc.*, 407 F.Supp. 164, 173 (D.C.V.I. 1975). Such exposure is not mooted by Mesa's argument that it is entitled to an

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* Overpayments also exist on the other three leases.

individual refund. Mesa April Memo. at 18-20; Mesa Reply Memo. at 3-7. As the court noted in *Olivier* v. *Humble Oil & Refining Co.*, 225 F.Supp. 536, 538 (E.D. La. 1963), "it is immaterial under Rule 22 whether there is * * * independent liability." In *Olivier* the owner of certain land brought an action against Humble Oil for the unpaid accummulated royalties to which it was entitled pursuant to contract. Humble Oil counterclaimed in interpleader against Helis and Laudumiey, who also had royalty interests in the same land through a different chain of title. Humble Oil averred that it may be exposed to double liability, because of the potentially adverse royalty claims of Olivier and Helis and Laudumiey.

In opposing interpleader, plaintiff argued that because Humble Oil had directly conveyed to Olivier his overriding interest, Olivier's interest was independent of the others. This is analogous to Mesa's assertion that its right to a refund is independent of the other co-lessees because of something the MMS did to cause Mesa's overpayment to be separate from the lease account, such as accepting royalty payments directly from Mesa, or allowing Mesa to jointly hold a lease interest. Whatever Mesa is asserting, as the court said in *Olivier* in permitting interpleader:

> Under Rule 22 it is immaterial that a party counterclaiming for interpleader has so-called independent liability to plaintiff or that the claims of the parties sought to be interplead are independent of the claims of plaintiff. *Id.* at 539.

Thus, it is no defense to an action for interpleader that one of the parties claims independent liability. Accordingly, federal defendant submits its counterclaim in interpleader should be permitted.

III. IN ANY EVENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Plaintiff Mesa essentially contends that it is entitled to a refund in the full amount of $1,508,748.32. The errors in plaintiff's argument are two-fold. First, certain portions of the above-claimed figure are barred by the two year statute of limitations contained in section 10 of the OCSLA, 43 U.S.C. § 1339(a). See Def. May Memo. at 3. Secondly, plaintiff's argument is based on its unreasonable and self-centered notion that it is to be refunded its own overpayment without regard to the status of the royalty accounts of its co-lessees with whom it has deliberately chosen to conduct business. Defendant submits neither of these contentions is well founded.

In any event, to the extent plaintiff's motion seeks to compel the MMS to process Mesa' refund request, such has been accomplished and thus that portion of Mesa's motion is now moot.

A. Portions Of Mesa's Claimed Refund Amount Are Barred By The Statute Of Limitations.

There can be no question that a portion of Mesa's $1,508,748.32 refund request is barred by the statute of limitations contained in section 10 the OCSLA, 43 U.S.C. § 1339(a). Def. May Memo at 2-4.

The MMS's analysis of the July 1985 accounting submitted by Phillips, the lease operator, on behalf of the co-lessees, shows that on lease 2743, Mesa has overpaid its royalties in the amount of $912,881.54. Of that amount, however, MMS can refund only $820,575.21 because of the two-year statute of limitations. Def. Supp. Ex. 1, ¶ 4.*

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* Lease 4241 is also overpaid as a whole in the amount of $317,105.15, none of which at the present time is believed to be barred by the statute of limitations. On lease 2557, Mesa has underpaid its share by $42,635.91 accordingly to current account-

B. The MMS Properly Regarded The Lease Royalty Account As A Whole.

Mesa's view that MMS must treat it separately from its co-lessees defies federal law, the common law, and common sense. For the purpose of satisfying their obligations under the lease, the co-lessees stand as one. This unity of obligation was explained by the Department when it stated that "all parties holding undivided interests [in an OCS lease] are responsible for the rentals and royalties." *Continental Oil Co.*, 74 I.D. 229, 236 (1967).* Rather, Mesa would have MMS treat each co-lessee separately. In effect, Mesa claims that by granting a lease to more than one entity and accepting payments from each interest holder, MMS has created the equivalent of separate leases, each with its own distinct royalty obligation. The Department has rejected this view, holding that ownership of an undivided interest in a lease does not constitute ownership of a separate lease, but represents a partial interest in the lease as a whole. *Kirby Petroleum Co.*, 67 I.D. 404 (1960).

That MMS's view is correct is plain from the language of the lease. The MMS's view that the lease confers unified obligations is clearly illustrated by the obligation in the lease to drill for and produce gas. In order to extend the lease term beyond the initial five years, the lessees must drill for and produce oil or gas. Mesa's Exs.

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ings. On lease 3286, current figures indicate that Mesa has overpaid its share by $294,215.38, but that the lease as a whole is underpaid by $153,678.12.

* Mesa attempts to distinguish *Continental* on the grounds that the quoted passage referred only to undivided interests acquired through assignment. Mesa's Reply Memo at 9. That distinction, however, is insignificant. Regardless of how the lessee obtained its interest, whether through assignment or original lease issuance, the obligations conferred by the lease are identical. An assignment neither increases nor decreases the lease obligations. *See Mire* v. *Sunray DX Oil Co.*, 285 F.Supp. 885 (W.D. La. 1968).

1-4, § 4. Under the operating agreements for these four leases, Mesa is not required to participate in the drilling of any well. Def. Supp. Ex. 4-7 at Art. XIV. If the lease produces gas but Mesa elected not to participate in any more drilling beyond the fifth year of the lease, Mesa's proportionate share of the lease would not expire. The entire lease would remain in effect because of the gas production, regardless of who had participated in making the production possible. Just as production is viewed on a lease-wide basis, likewise royalties accrue for the lease as a whole.

It is reasonable and proper for the MMS to treat Mesa's pro-rata overpayments as being made on behalf of the other co-lessees when the lease balance is negative. First, nothing in the lease agreement exonerates Mesa from several liability. Indeed, the lease agreement describes the co-lessees as "Lessee" and obligates the "Lessee" to pay to the MMS "a royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area." Mesa's Exs. 1-4. No provision is made in the lease agreements to permit Mesa to be liable for royalties on something less than total production "from the leased area."

MMS's argument herein is consistent with the authority to seek cancellation of the lease when the co-lessees have not fully paid royalty. Section 5(d) of the OCSLA, 43 U.S.C. § 1334(d), provides for the judicial cancellation of a lease "whenever the owner of any producing lease fails to comply with any of the provisions of [the OCSLA], of the lease, or of the regulations issued under [the OCSLA]." The failure to pay proper royalties is the type of violation which warrants lease cancellation. *See Nunez* v. *Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978); *Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir. 1950); H. Rep. 859, 97th Cong., 2d Sess. 18, reprinted at [1982] U.S. Code Cong. & Ad. News 4268, 4272 (If * * * failures to pay royalties are fla-

grant and persistent, the lease may be cancelled * * *.");
see also Melancon v. *Texas Co.*, 89 So. 2d 135 (La. 1956).
Furthermore, cancellation is not limited simply to the guilty lessee's interest, but includes the entire lease. Section 5(d) of the OCSLA, 43 U.S.C. § 1334(d), does not restrict cancellation to the particular interest held by the party which precipitated forfeiture proceedings. Instead, it states that the "*lease* may be forfeited and cancelled" whenever the owner violates a duty imposed by statute, regulation, or lease term. *Id.* (emphasis added). It says nothing about dividing the lease into cancellable and non-cancellable parts.

The MMS's view is also consistent with the nature of undivided interests under the common law. It is well established in equity that a co-tenant, such as Mesa, who discharges more than its share of a common debt has a right of contribution from the other co-tenants. The enforcement of this right often occurs through a subrogation decree. *Newbold* v. *Smart*, 67 Ala. 326 (1880); *Thurston* v. *Holden*, 265 F. 697 (Id. 1928); *Simpson* v. *Gardina*, 97 Ill. 237 (1881). The cases are legion which hold that a tenant in common who pays the entire amount of taxes or special assessments on property held in common has a right to contribution from his co-tenant. *Victoria Copper Mining Co.* v. *Rich*, 193 F. 314 (5th Cir. 1911); *Interstate Land Co.* v. *Doyle*, 52 So. 991 (S.Ct. La. 1910; *Anderson* v. *McGee*, 130 S.W. 1040 (Tex. Civ. App. 1910); *Roberts* v. *Roberts*, 278 S.W. 937 (Tex. Civ. App. 1925); *see also* 48 A.L.R. 586-603.

In *Van Brunt* v. *Gordon*, 54 N.W. 1118 (Minn. 1893), the plaintiff and defendant were lessees of land and agreed to pay to the lessor a certain rent and to pay the taxes on the land. The plaintiff paid all of the taxes and rent and brought suit for contribution from the defendant. The court stated:

> These taxes and rent constituted a debt which plaintiff and defendant were jointly obligated to pay, just

> the same as if they had brought the property and given their joint note for the purchase money. The simple facts are that both were equally bound by their contract to pay certain sums of money, and one of them has paid the whole. The familiar rule applies that the one who has paid more than his share is entitled to contribution from the other, to reimburse him for the excess so paid, and thus equalize their common burdens. This rule is based on the maxim that equality is equity.

Id. at ——; *see* also 106 A.L.R. 1212 (1937), 61 A.L.R. 587 (1927).

At no time has Mesa made any attempt to exercise its right of contribution against the underpaying co-lessees. Because Mesa has a contractual as well as an equitable right of contribution, it is not without a remedy against its delinquent co-lessees. *See generally*, Levmore *Explaining Restitution*, 71 Va. L. Rev. 65-124 (1985); *Dawson, The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409-1443 (1974); Palmer, 1 *Law of Restitution*, § 10.5. As has been noted:

> Unless othewise agreed, a person who has discharged more than his proportionate share of duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct.

Restatement on Restitution § 81.

Finally, MMS's view is consistent with the way the co-lessees have agreed among themselves to operate the four leases. After receiving the leases, Mesa and its co-leases executed operating agreements for each of the four leases. These agreements govern the obligations of the co-lessees among themselves with respect to each lease and they show that the co-lessees expected to be treated as one

with respect to their obligations under the lease. Because Mesa's motion for summary judgment is most pertinent with respect to lease 3286,* we focus our argument on that agreement. Def. Supp. Ex. ——.

Under Article XI, the operator of the lease is to pay rental and minimum royalty to the lessor and then to charge the payment to the co-lessees "Joint Account." Through that account the co-lessees would reimburse the operator and themselves. Plainly, the co-lessees intend to discharge their rental obligation to the lessor as one. They do not pretend that each is responsible to the lessor solely for its percentage share of the rent or minimum royalty. Thus their percentage shares are relevant only among themselves. In most respects, the co-lessees have a similar arrangement for the payment of royalties. Further under Article XII, as a general rule, the "Operator shall pay or cause to be paid all royalties * * *." As an exception to this rule, if one of the non-operator co-lessees sells some of the production on its own, it "shall make payment of all royalties applicable to that portion of the production * * *." No agreement has been made to pay the lessor only their percentage shares of the royalty, except in this one 'separate sale' instance.

While Mesa has repeatedly disavowed having "control" over its co-lessees, it is clear that controls are present in the operating agreement. Under Article XXVI, no co-lessee may sell its interest in the joint lease without the approval of at least three of the parties holding 51% of the interest. Under Article IV, any assignment of an interest is subject to the provisions of the operating agreement. Under Article IV, any assignment of an

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* Leases 2421 and 2743 are overpaid as a whole as well as by Mesa from an individual point of view. On lease 2557, both the lease as a whole, as well as Mesa individually, are underpaid. Only with respect to lease 3286 is the court faced with the situation where, although the lease as a whole is underpaid, from an individual point of view Mesa has overpaid.

interest is subject to the provisions of the operating agreement. Under Article VI, a co-lessee who fails to pay its share of expense is placed "in default"; the others are liable for his unpaid share and obtain a lien against the defaulter's share of production. Under Article VII, the co-lessee may inspect the operator's accounting "at all reasonable times." Under Article X, the operator is required to furnish any co-lessee, upon request, a "monthly report on the production, and the volume and value of Oil and Gas Sales, from each producing well being operated on the Joint Lease."

In sum, in addition to other remedies at law or equity, the co-lessees have mechanisms in the operating agreement to learn of, and balance, overpayments and underpayments of royalty. They are well prepared to be treated as one when dealing with the lessor.

C. Mesa Is Not Entitled To Be Awarded The Entire Amount Overpaid On The Lease As If The Co-Lessees Did Not Exist.

Mesa has made three spurious arguments in an attempt to persuade this court to order the MMS to repay to Mesa the entire excess amount on the leases. First, Mesa argues that section 10 requires the MMS to treat Mesa individually. However, section 10 does not prevent the Secretary from refunding only when the net balance on a given lease is overpaid. Section 10 gives broad latitude to the Secretary to determine ("to his satisfaction") when an overpayment has occurred. Viewing the lease as a whole for refund purposes is a reasonable application of section 10.* To now require the MMS to police

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* It is likewise reasonable for the Secretary to treat overpaying lessees individually for purposes of applying the two year statute of limitations of Section 10. The event which begins the running of that limit is the date of payment, regardless of why or by whom it was made. 22 U.S.C. § 1339(a). If an individual co-lessee makes

the affairs among the several co-lessees and segment accounting for refunding, as Mesa suggests, is contrary to the reasonable interpretation of section 10 the MMS has made. There is a strong federal policy, confirmed by precedent, that administrative agencies have wide discretion over statutes entrusted to their case. "[T]he practical construction given to an act of Congress, fairly susceptible to different constructions, by those charged with the duty of executing it is entitled to great respect * * *." *McClaren* v. *Fletcher*, 256 U.S. 477, 481 (1921). It is the MMS's prerogative to interpret section 10 as conditioning refunds upon a net positive lease balance.

Next, Mesa contends that the government has changed its position of not holding all of the co-leassees "accountable for each others separate royalty payments." Mesa's Reply Memo at 4. Mesa claims such a change is in violation of section 101 of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. § 1711(c)(1), which states in pertinent part:

> The Secretary shall audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted. The Secretary shall conduct audits and reconciliations of lease accounts in conformity with the business practices and record keeping systems which were required of the lessee by the Secretary for the period covered by the audit.

Mesa erroneously argues that section 101 puts the MMS "under a statutory duty to evaluate Mesa's royalty account and process Mesa's refund request on an *individual* basis, irrespective of the royalty account statue of other lessees." Mesa's Reply Memo at 4. However, sec-

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a payment on its own behalf the two-year period begins on that payment date and not some other date such as the date of a different co-lessee's payment.

tion 101 was enacted to require the MMS to use the same accounting practices during an audit as were used during the period of time covered by the audit. In the House Report on FOGRMA, the Committee on Interior and Insular Affairs noted that the intent of the bill was "for the Secretary to apply the same rules and regulations in the audit that were applicable at the time the royalty obligation was incurred." H.R. Report 97-859 on H.R. 5121, 97th Congress, 2d Session, [1982) U.S. Code & Ad. News 4268, 4288. This section was designed to prevent the Secretary from retroactively applying newly enacted regulations and in no way affects Mesa's obligations under the leases.

Moreover, even assuming that Mesa's interpretation of section 101 is correct, MMS has not altered its requirements for OCS royalty refunds. Contrary to Mesa's contentions, the MMS has not changed its accounting rules to now hold Mesa, or any other co-lessee, severably liable (i.e. individually liable for 100% of the royalties due).* Mesa has confused several liability with conditioning refunds upon the existence of a positive net balance. Mesa's claim that the MMS "acknowledged in two uncompleted rulemaking proceedings that it has never before held an individual payor in Mesa's situation responsible for other lessee's royalty underpayments." Mesa's Reply Memo at 5. The "single payor" proposal to which Mesa refers, however, is fundamentally different than the Mesa situation. The single payor idea would establish one entity who would be "responsible for maintaining all lease production and sales records, and for the payment of rentals and royalties." 49 *Fed. Reg.* 47624-25 (Dec. 6, 1984). The single payor's responsi-

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* The expression "severally liable" when applied to multiple parties implies that each is liable alone. *Pruyn* v. *Black*, 21 N.Y. 300, 303. Black's Law Dictionary (5th Ed.) defines "severally liability" as "[L]iability separate and distinct from liability to another to the extent that an independent action may be brought without joinder of others."

bilities essentially would include every lease obligation; in effect, it would place an intermediary between the MMS and each co-lessee. The rulemaking proceedings to which Mesa refers were solicitations by the MMS for comments on a proposal to establish for each federal lease a "single payor." * Mesa's situation is much more limited. The MMS is not insisting that Mesa act as single payor and pay the entire royalty due on the leases. Instead, MMS, which has sent demand letters to the underpaying lessees, merely has conditioned Mesa's refund on a positive lease account balance. This prerequisite falls far short of establishing a single payor concept and several liability.

Finally, Mesa argues that only the MMS is in the position to acquire the information necessary to calculate the amounts owing on the lease accounts and therefore the co-lessees cannot be responsible for each other accounts. This is simply not true. Mesa has contracted with the other co-lessees for the right to examine all accounting information.** Article VII of the Operating Agreement between Mesa and its co-lessees states in part:

> Operator shall keep an accurate record of all accounts hereunder showing the costs expenditures incurred and charges made and all credits received and returns made and received of non-operators [co-lessees] or its duly authorized representatives.

Thus, Mesa should not be permitted to have the MMS enforce its Operating Agreement rights. Operating

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* This proposal never reached the proposed rule stage.

** Mesa claims that examining the accounting information for the lease, including information supplied by its co-lessees pursuant to the Operating Agreement, would expose it to accusations of antitrust violations. Mesa's Reply Memo at 11. The exchange of price and sales information is not a *per se* violation of the antitrust laws; in fact, when the exchange occurs in furtherance of the public interest (*i.e.*, the timely and complete payment of royalties), it would be no violation at all. *See Parker* v. *Brown*, 317 U.S. 341 (1943).

Agreements are just between the co-lessees and their lease operator. The Operating Agreement in no way changes the rights or obligations of a co-lessees or the MMS. *Peterson*, 58 I.D. 661 (1944), *aff'd*, *Peterson* v. *Ickes*, 151 F.2d 301 (D.C. Cir. 1945).

CONCLUSION

For the foregoing reasons, it is respectfully requested that defendant's motion to dismiss be granted, or in the alternative that defendant's motion for interpleader be granted; and that in any regard, that plaintiff's motion for partial summary judgment be denied.

Dated: September 9th, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION TO FILE COUNTERCLAIM IN INTERPLEADER, COUNTERCLAIM FOR INTERPLEADER, MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S COUNTERCLAIM FOR INTERPLEADER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT and order thereon, were served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed, this 9th day of September, 1985:

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No. 85-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR AMICI CURIAE HOWELL CORPORATION; INDUSTRIAL FUEL & ASPHALT OF INDIANA, INC.; DEMENNO/KERDOON, INC.; NAVAJO REFINING COMPANY; TIPPERARY REFINING COMPANY; WESRECO, INC., dba WESTERN REFINING COMPANY, INDUSTRIAL ENERGY PARTNERS, LTD., MM&S PARTNERS, AND ANNA W. DRAKE, TRUSTEE IN BANKRUPTCY FOR WESTERN OIL MARKETING COMPANY; GARY REFINING COMPANY; AND TEXAS AMERICAN PETROCHEMICALS, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This brief is in support of the Petition for a Writ of Certiorari filed by Lunday-Thagard Company (Lunday-Thagard or Petitioner). *Amici*, like Lunday-Thagard, are small refiners that purchased royalty crude oil from the United States Department of the Interior (Interior) be-

tween 1974 and 1981 pursuant to contracts with Interior. During this period, widespread shortages of crude oil, coupled with spiraling costs, left many small refiners with no source for crude oil other than Interior. Without the availability of such oil, numerous small refiners would have been forced to shut down their refineries.

From April 2, 1974, the Mandatory Petroleum Price Regulations (Price Regulations), 10 C.F.R. Part 212, promulgated by the United States Department of Energy (DOE) pursuant to the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751 *et seq.*, provided that the prices charged by "any federal department, agency, or other instrumentality" for the sale of crude oil were subject to the Price Regulations. *See* 10 C.F.R. § 212.52. Moreover, in 1978, Congress confirmed the applicability of DOE's regulations to Interior's sales of crude oil when, in the course of amending the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. §§ 1331 *et seq.* (West Supp. 1985), it inserted several statutory provisions to "provide that the authority of the Secretary of Interior to sell oil is limited by any provision of law in effect, or regulation implementing such law, providing for mandatory allocation and pricing." [1] Thereafter, Interior's standardized contracts were amended to provide that "the price to be paid would be the highest allowable by EPAA." (Pet. App. A at 2a). Hence, Interior, like the private companies in the petroleum industry with which it contracted, was subject to the DOE's Price Regulations.

Despite the above, Interior, which is one of the nation's largest producers of crude oil, made a deliberate decision, at least as early as 1975, to violate the DOE's Price Regulations. Furthermore, as reflected in internal memoranda obtained from Interior and DOE that are reproduced in the Appendix hereto, Interior persisted in

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[1] Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 1474, 95th Cong., 2d Sess. 121 (1978).

its violations of DOE regulations in defiance of the explicit language of the OCSLA amendments and its own contracts, the demands of DOE enforcement officials, repeated advice from its own Solicitor's Office, advice of the Department of Justice, and the entreaties of the small refiners from which it wrongfully exacted overcharges. Unlike the Department of the Navy which in 1976 requested and received an explicit Congressional exemption from the DOE Price Regulations,[2] Interior, during the period of price controls, never attempted to obtain either legislative or administrative relief from the Price Regulations relevant to this case.

Relying on Sections 210 and 211 of the Economic Stabilization Act of 1970 (ESA) as amended, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the EPAA, on the Tucker Act, 28 U.S.C. § 1346, and on OCSLA, numerous small refiners, including *amici*, have filed actions before United States district courts against Interior seeking the return of the above overcharges which are estimated by Interior to exceed one billion dollars. Based in part on this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), the district courts have consistently sustained the right of small refiners to bring such actions against Interior and have repeatedly rejected Interior's argument that such actions are barred by sovereign immunity. (Pet. at 17). In its decision below, the Temporary Emergency Court of Appeals (TECA) recognized that a claim of injury has been presented "which on its face appears to call for a remedy" (Pet.

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[2] Following the decision in *Mohawk Petroleum Corp. v. Department of Navy*, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975), that sales of crude oil produced by the United States Department of the Navy were subject to the EPAA and DOE regulations, Congress granted an exemption to the Navy. *See* 10 U.S.C.A. § 7430(b) (West Supp. 1985). A similar exemption was never granted to Interior. Indeed, as noted *infra*, at 7-8, Congress in 1982 explicitly rejected Interior's request for a retroactive exemption and thereby acquiesced in the holding in *Mohawk* that federal agencies were subject to suit.

App. A, at 8a), but nevertheless concluded that no remedy is afforded by the ESA and, by implication, held that the ESA repealed the remedy that otherwise would be afforded by the Tucker Act.

Interior has already seized upon TECA's holding below as the basis for seeking dismissal of certain cases brought by *amici* against Interior.[3] Absent action by this Court, TECA's decision, although demonstrably in error and in conflict with several recent decisions of this Court, will control since TECA has exclusive appellate jurisdiction over appeals from the district courts over issues arising under the EPAA.

SUMMARY OF ARGUMENT

In rendering its decision, TECA applied a method of analysis that was explicitly repudiated by this Court in *United States v. Mitchell, supra*, 463 U.S. at 211-19. That, in and of itself, warrants reversal of the TECA decision.

Moreover, sovereign immunity should not shield Interior from liability for its willful violations of the DOE regulations and the terms of its own contracts. By invoking sovereign immunity against Petitioner, TECA acted contrary to the clear intent of Congress expressed in the Tucker Act, in the 1978 amendments to OCSLA, and in 1982 royalty management legislation.

The Tucker Act unequivocally waives sovereign immunity with respect to commercial activities, such as those which are the subject of this suit. The 1978 amendments to OCSLA permit "citizens suits" arising out of violations of DOE's Price Regulations to be brought against "any person, including the United States, and any other govern-

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[3] Based on the Lunday-Thagard decision, the United States District Court in Tipperary Refining Company v. United States Department of the Interior, No. MO-84-CA-05, W.D. Tex., by order filed October 9, 1985, reversed its prior order and dismissed all of Tipperary's claims except that involving transportation charges. *See Amici* App. B at 78a.

mental instrumentality or agency" without restricting any other right the citizen "may have under any other Act or common law to seek appropriate relief." Finally, in 1982 Congress specifically rejected proposed legislation that would have barred small refiners from bringing actions against Interior based on Interior's past violations of DOE's regulations, and instead adopted legislation that dictates how Interior's liabilities for overcharges are to be shared by Interior with the States.

By these actions, Congress has expressed its unambiguous intent that Interior be held accountable for its refusal to comply with the DOE's Price Regulations. In short, there is no need for small refiners to "look to Congress for relief" as TECA has suggested (Pet. App. A at 8a); Congress has already spoken. TECA's ultimate conclusion (Pet. App. A at 8a) that the small refiners are without a remedy is in fundamental conflict with the above expressions of congressional intent and should be reversed.

The failure of the appeals court to recognize the distinction between the "governmental" and "proprietary" functions performed by Interior (Pet. App. A at 5a-6a) is both misleading and unnecessary to the resolution of the controversy. Indeed, because all of Interior's sales of crude oil were made pursuant to written contracts, as is customary with most commercial transactions, the decision below shielding Interior from liability arising out of its contractual activities is flatly inconsistent with the Tucker Act, which has long waived sovereign immunity for all contract claims.

Given the serious consequences of TECA's decision and the substantial harm that will be realized by the small refiners if they are denied their day in court, it is imperative that the decision be subjected to review by this Court. Indeed, the fundamental conflict that exists between TECA's decision and several recent decisions of this Court strongly suggests that summary reversal may be appropriate.

ARGUMENT

I. The Doctrine Of Sovereign Immunity Should Not Insulate Government Agencies From The Consequences Of Violations Of The Law In Their Commercial Dealings.

"[T]he stated purpose of the doctrine [of sovereign immunity] is to protect *government functions*, not merely to protect the government." (Emphasis in original). *Wesreco, Inc. v. United States Department of the Interior*, C-84-0126J (D. Utah April 12, 1985), slip op. at 28, *citing Larson v. Domestic & Foreign Corporation*, 337 U.S. 682, 704 (1949).[4]

Sovereign immunity should not shield a government agency acting in a commercial context from liability arising out of violations of regulations promulgated by another agency. It is an ancient axiom that when government "comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875). This is especially true here, where the regulations—and the laws under which they were promulgated—were intended to regulate the very activities in wl ich Interior was engaged, and where Interior officials acted with full knowledge of the unlawfulness of their activities and the consequences flowing therefrom.

TECA's refusal to enforce compliance with the EPAA and the DOE's Price Regulations has frustrated the unquestioned governmental function of enforcing the EPAA and DOE's regulations. As the *Wesreco* court recognized (slip op. at 34-35), Congress sought to promote enforcement of the EPAA "by allowing every person suffering legal wrong to act as a private Attorney General under §§ 210 and 211" of the ESA. Also, by specifically con-

[4] A copy of the *Wesreco* opinion has been lodged with the Court by Petitioner.

firming that Interior's authority to sell crude oil was subject to, and limited by, the EPAA and DOE's regulations, and by authorizing citizens suits for damages against Interior under Section 23 of OCSLA, Congress clearly indicated its intention to enforce compliance through private actions against Interior.

Furthermore, TECA's decision to immunize Interior from liability conflicts with recent congressional pronouncements that implicitly acknowledge a waiver of sovereign immunity. In the course of its deliberations involving the Federal Oil & Gas Royalty Management Act of 1982 (FOGRMA), Congress pointedly rejected language proposed by Interior that "would have provided the Department of the Interior with an absolute defense against lawsuits alleging that the Department sold royalty crude oil taken in-kind at prices not permitted under Department of Energy regulations implementing the Emergency Petroleum Allocation Act of 1973." S. Rep. No. 512, 97th Cong., 2d Sess. 11-20 (1982).[5] Instead, Congress specified the manner in which States are to be assessed their "share of an overcharge, resulting from" any failure by Interior "to comply with the [EPAA] or regulation of the Secretary of Energy thereunder concerning crude oil certification or pricing with respect to crude oil taken by the Secretary in kind as royalty," and prohibited Interior from assessing States any portion of any interest or penalties charged against Interior as a result of such violations. *See* 30 U.S.C.A. § 1721(e) (West Supp. 1985). Both of these provisions would be superfluous if Interior

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[5] Interior included a bid for legislative amnesty in Section 12 of the original "Federal Energy and Mineral Resources Act of 1982" that it sent to Congress. The Senate, however. substituted its own text in which it made the substantive changes relied upon by *amici* herein that were ultimately enacted as part of FOGRMA, P. Law No. 97-451, 96 Stat. 2448 (1983), as codified at 30 U.S.C.A. §§ 1701 *et seq.* *See* S. Rep. No. 512, *supra*, at 11-20.

were immune from suit under the EPAA and the DOE regulations.[6]

The Congress was fully aware of the many actions already pending in the district courts challenging the lawfulness of Interior's actions when it inserted the above provisions. Indeed, the necessity for their inclusion was predicated on the Senate's concern that overcharges may result from decisions made during the period of price controls "by employees of the Department of the Interior about compliance with the price and allocation rules" promulgated by DOE. S. Rep. 512, *supra*, at 16.

The Interior employees' decisions, referred to by the Senate, not to comply with DOE regulations are documented in memoranda and other correspondence. These

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[6] In declining to grant Interior amnesty or immunity from suits brought by small refiners, Congress repeated its concern, set forth in every major piece of energy-related legislation in the 1970's, that small refiners be protected. Congress' recognition of the plight of the small refiners was perhaps most explicitly stated in 1973 when, in the course of enacting the EPAA, Congress "offer[ed] a mantle of protection to those refiners who by reason of their relatively small size may be disadvantaged in competing with larger refiners in bidding for and obtaining adequate crude supplies." H. Rep. No. 628, 93rd Cong., 1st Sess. 17 (1973). *See* EPAA § 4(b)(1)(D), 15 U.S.C. § 753(b)(1)(D). The continuing congressional intent to protect small refiners is reflected in Acts that amended and supplemented EPAA. *See* Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975), section 403, as codified at 15 U.S.C. § 753(e), which amended DOE's entitlements program to relieve small refiners of a portion of the financial burden resulting from application of that program as originally enacted; Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976), which, in section 123, expressed the intent of Congress to foster "construction of new refineries by small and independent refiners in the United States"; and Section 27 of OCSLA, 43 U.S.C.A. § 1353(b) (West Supp. 1985), which provided for allocation of royalty oil to small refiners.

documents, some of which have been reproduced in the Appendix hereto, track Interior's deliberate violations of DOE regulations throughout the period of price controls.[7] While Interior officials were fully aware, at least as early as May 1975, that Interior's procedures governing the sale of royalty oil failed to comply with DOE's Price Regulations, they chose not to implement an available procedure that would have brought them into compliance "because of the additional workload involved" and because Interior could foresee "no internal benefits". (*See Amici* App. at 1a-2a). In memoranda dated March 17, 1976 and April 19, 1976, Interior operations personnel noted that "[i]f we do not follow the [DOE] regulations, we violate the law", and requested guidance from Interior's Office of the Solicitor with respect to the conflict. (*Amici* App. at 5a). These memoranda also reflect that DOE auditors had already advised Interior that its practices violated DOE's regulations and that such violations resulted in royalty oil purchasers "paying royalties on prices that exceed the posted prices allowed by [DOE] regulations." (*Id.* at 11a-12a). In responding to the requests for legal advice, Interior's Assistant Solicitor concluded, as its operations personnel and the DOE auditors had, that DOE's regulations applied to prices charged by federal agencies. (*Id.* at 18a). In a later memorandum dated August 23, 1976, the Assistant Solicitor unequivocally advised operations personnel again that in "the sale of royalty oil, the valuation and billing for that oil is subject to the [DOE] regulations" and thus, "the valuation of royalty oil cannot exceed the ceiling price set by the [DOE's] regulations." (*Id.* at 18a).

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[7] These documents have been released by Interior and DOE pursuant to FOIA requests. In many instances portions of the documents were excised prior to their release. Also, many contain handwritten interlineations. Because it is impossible to reproduce these interlineations in the Appendix, a complete photostatic set of the documents has been lodged with the Court.

Throughout this period, DOE repeatedly advised Interior that it was in violation of the Price Regulations, and, as a result, was charging prices in excess of the ceiling price permitted by DOE's regulations. In a May 197[illegible] memorandum recording the substance of a meeting between Interior representatives and DOE enforcement officials, a senior DOE attorney recounted that DOE had advised Interior that "[t]hese violations appeared to be clear cut and extremely troublesome to [DOE], given [DOE's] mandate from the Congress to impose regulations on all crude oil produced in or imported into the United States." (*Id.* at 20a). Following this meeting, DOE's Deputy General Counsel for Enforcement requested that Interior provide a written justification for its disregard of DOE regulations in order to resolve the dispute between the two agencies "which continues to plague the enforcement operations of [DOE]." (*Id.* at 22a). Absent such justification, the DOE officials concluded, DOE would "have no choice but to proceed against [Interior] in the context of a formal compliance action." (*Id.*).

In response to DOE's request, Interior's Solicitor issued a memorandum in October 1977 to DOE's chief law enforcement official which, in direct conflict with the 1976 internal memoranda, purported to challenge DOE's authority over Interior's valuation of royalty oil. (*Id.* at 49a). This memorandum, which was Interior's only formal attempt to rationalize its violations, did not persuade DOE, which continued to assert that Interior must comply with the DOE's regulations or be subjected to enforcement proceedings. (*See id.* at 54a, 55a-56a, and 57a-60a).

DOE was not alone in its position. A 1981 Interior memorandum states that "[o]n at least one occasion the Department of Justice suggested that our position [as expressed in the October 1977 memorandum] was not legally defensible." (*Id.* at 61a). Indeed, upon further

review by a staff attorney in Interior's Solicitor's Office, both the reasoning and the conclusions expressed in the October 1977 memorandum were judged to be "not legally supportable" and lacking "adequate legal or factual justification." (*Id.* at 66a-67a).[8]

Having failed in its attempt to dissuade DOE, Interior nevertheless continued to violate the regulations throughout the period of price controls. This course eventually provoked the Director of DOE's Office of Enforcement to advise Interior that DOE was "bringing criminal charges against certain private oil companies for violating DOE's pricing regulations, and the companies are asserting as a defense [Interior's] pricing behavior." (*Id.* at 68a). The DOE Director of Enforcement (*id.*) also advised Interior:

> . . . the federal government is going to look absolutely terrible and DOE's prosecutions of flagrant behavior by private individuals is [sic] going to be hampered by the failure to resolve [the issue of Interior's unlawful pricing behavior]. . . . [Interior] and DOE both may well end up with a serious black eye if the situation is not resolved soon.

Although Interior was able to forestall DOE from bringing an enforcement action against it,[9] it was unable to prevent small refiners from exercising their rights

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[8] In any event, the basic assumptions and conclusions stated in this memorandum were undercut by the 1978 Amendments to OCSLA which explicitly made Interior's sales of crude oil subject to DOE's regulations.

[9] As noted in an article concerning Interior's violations, "[f]ederal energy regulators threatened to file formal overcharge allegations in court against the Interior Department several times, but they never carried out the threat." As the article continues, "'[t]he U.S. government doesn't often sue itself,' says Thomas Newkirk, a deputy general counsel of the Energy Department. He suggests that political pressure and jurisdictional squabbling thwarted aggressive and timely enforcement action." Pasztor, Lawsuit Alleges Interior Officials Violated Federal Oil Price Controls, Wall St. J., June 13, 1984, at 31, col. 4.

under Section 210 of the ESA "to act as a private Attorney General." *See Wesreco*, slip op. at 34. As Interior's correspondence with the Department of Justice reveals, Interior was caught in a bind. While it did not want to take the chance that a federal court might rule against it, it nevertheless was reluctant to settle since it recognized that other suits by small refiners would follow. (*Amici* App. at 69a-74a).

Instead of altering its practices to comply with the law, Interior turned its attention to devising a scheme that would permit it to evade liability. As explained in a May 16, 1980 memorandum, Interior fashioned a multipronged approach which included asking the "Department of Justice as a delaying tactic to adopt a position based on the [October 1977] memorandum that the Department of the Interior is not bound" by the relevant regulatory requirements. (*Id.* at 75a). Other alternatives included seeking "a legislative exemption" from the DOE's pricing regulations—a step which was initiated in 1982, more than one year after DOE's regulations had been revoked and which, as noted *supra*, was ultimately unsuccessful.

The May 16, 1980 memorandum also suggested that an exemption be sought from DOE—a step that was not taken until mid-November 1982, well after expiration of the Price Regulations. Critical to DOE's approach was its realization (*id.* at 77a) that such an approach was necessary because "*we cannot expect Justice to continue to defend* [Interior] *in future cases.*" (Emphasis added.)

In summary, Interior was aware from the outset that its sales of crude oil were covered by the DOE's regulations. However, with absolutely no justification, Interior deliberately refused to comply with those regulations. Even after being advised by the highest ranking DOE enforcement officials and its own legal officers that its conduct was in clear violation of the law, Interior re-

fused to alter its course, and instead adopted a policy of obstruction designed to defeat the small refiners' private enforcement actions and to avoid the wholly foreseeable consequences of its knowing and willful unlawful conduct.

TECA's elimination of the private enforcement actions that have proved to be the only effective means of assuring the integrity of the legislation against Interior's violations stands the purpose of sovereign immunity on its head. By permitting Interior to hide behind the shield that it has fashioned, TECA has not advanced the "governmental function" of enforcing the congressional mandate "to impose regulations on all crude oil produced in . . . the United States." (*Amici* App. at 20a). Instead, TECA has protected one of the largest and most flagrant violators of the DOE Price Regulations from liability and has disregarded Congress' intent to make Interior accountable to small refiners for its unlawful activities.

II. The Decision Below Erroneously Disregarded The OCSLA.

TECA's conclusion that sovereign immunity shields Interior's violations of the DOE's regulations is in fundamental conflict with OCSLA and the independent waiver of sovereign immunity provided thereby. Although TECA conceded (Pet. App. A. at 2a, n.1) that OCSLA is applicable to Interior's sale of royalty oil, it disregarded the clear recognition in the 1978 Amendments to that Act that sovereign immunity had been waived. Section 27 of the OCSLA, codified at 43 U.S.C.A. § 1353(b) (West Supp. 1985), contains an express reference to the Secretary of Energy and specifically confirms that Interior's sales are subject to the Price Regulations,[10] while Section

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[10] As previously noted (at 2), the DOE's Price Regulations specifically applied to prices charged by "any federal department, agency, or other instrumentality" for the sale of crude oil. Under DOE's initial regulations, sales by federal departments and agencies had been exempted. 10 C.F.R. § 212.52(a), 39 Fed. Reg. 1924

23, codified at 43 U.S.C.A. § 1319(e) (West Supp. 1985), expressly authorizes citizens' suits against Interior, thereby confirming the waiver of sovereign immunity with respect to such actions. Also, without restricting any rights that any person "may have under any other Act or common law to seek appropriate relief," [11] Congress expressly vested the district courts with jurisdiction over civil actions "against any person, including the United States, and any other government . . . agency," [12] involving violations of OCSLA, including jurisdiction to award reasonable attorney and expert witness fees.

Interior was aware that the 1978 OCSLA Amendments applied to its sales of crude oil and it promptly amended its standardized contracts to reflect these amendments. While it thus confirmed the nexus between its sales and DOE's regulations, it nevertheless continued to violate those same regulations.

Plainly, when Interior sold royalty oil without complying with EPAA and the DOE's Price Regulations, it not only breached its contracts, but it violated the provisions of Section 27 of OCSLA and thereby subjected itself to the relief granted by that Act to any person having a

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(1974). Because DOE determined that it would be inequitable to exempt federal agencies, the exemption was repealed effective April 2, 1974. 10 C.F.R. § 212.52, 39 Fed. Reg. 12252 (1974). Thereafter, Congress extended the EPAA and amended it on several other occasions. However, in stark contrast with the exemption extended by Congress in 1976 to the Department of the Navy, Congress never questioned DOE's repeal of the exemption with respect to Interior. *See* Act of Dec. 5, 1974, Pub. L. No. 93-511, 88 Stat. 1608; Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 481; Act of Nov. 14, 1975, Pub. L. No. 84-133, 89 Stat. 694; Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976); Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980); *cf.* note 2, *supra*.

[11] 43 U.S.C.A. § 1349(a)(6) (West Supp. 1985).

[12] *Id.* at § 1349.

valid legal interest that was adversely affected. This would include small refiners whose contracts with Interior recite the provisions of Section 27 of OCSLA linking the "regulated price" of the contract to the EPAA and the DOE's rules and orders issued thereunder.

III. By Invoking Sovereign Immunity In This Case, The Decision Below Is In Fundamental Conflict With *Mitchell*, The Tucker Act, And The Contrary Position Asserted Before This Court On Behalf Of Interior In *Mitchell*.

The claims asserted by Petitioner and *amici* clearly fall within three express categories of claims cognizable under the Tucker Act—those founded upon "any express . . . contract with the United States," those founded upon "any Act of Congress," and those founded upon "any . . . regulation of an executive department." While the decision below superficially focuses on the claims founded upon the EPAA and DOE's Price Regulations, the court's analysis ultimately disregards the simple breach of contract claims raised by Petitioner and *amici* arising out of Interior's failure to honor its contracts in which it agreed to comply with the EPAA and DOE regulations.

TECA's analysis blurs the distinction between the concepts of jurisdiction, cause of action and sovereign immunity, and otherwise fails to recognize the distinction between governmental and commercial activities. A glaring example of this is TECA's misapplication of *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947)—a case recognized to be the seminal estoppel case involving the federal government.[13] Claiming that *Merrill* eliminated the "distinction between the regula-

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[13] *Merrill* did not involve a claim of sovereign immunity; indeed this Court acknowledged (332 U.S. at 382) that it was "appropriate" that suit had been brought in the state court. The holding in *Merrill* is simply that the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not readily applicable to a governmental agency.

tory and private functions of the government" (Pet. App. A at 6a), TECA rejected the holdings of several district courts that Interior is subject to suit by small refiners because it was engaged in purely commercial activities. Not only is this result not supported by *Merrill*, but it is in clear conflict with the precedent of the Court of Claims. *See, e.g., Ottinger v. United States*, 116 Ct. Cl. 282, 285, 88 F. Supp. 881, 883 (1950).

More to the point, however, all of Interior's activities at issue here were conducted pursuant to written contracts with Petitioner. This should have ended TECA's inquiry; as this Court recognized in *Mitchell* (463 U.S. at 215), the "existence of a waiver is readily apparent in claims founded upon 'any express . . . contract with the United States'."

TECA, however, rejected (Pet. App. A at 6a-7a) the conclusion, reached by several district courts, that *Mitchell* has "dictated the existence of a waiver in EPAA cases." After quoting this Court's preliminary statement (463 U.S. at 212) that "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims", TECA dismissed *Mitchell* with the off-hand comment that "*Mitchell* does not apply because the whole purpose of the Tucker Act . . . is to permit suit against the United States" while the "EPAA merely speaks of 'persons' who may sue or be sued." (Pet. App. A at 7a).[14]

In addition to being factually incorrect—the EPAA does not speak of "persons" who may "be sued"—TECA's

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[14] TECA's assertion that "*Mitchell* does not apply" is also premised on its conclusion that its own decision in McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd., 577 F.2d 712 (Temp. Emer. Ct. App.), *cert. denied*, 439 U.S. 831 (1978), "controls this case." (*See* Pet. App. A at 5a). TECA's analysis in *McCulloch*, however, is based on this Court's suggestion in United States v. Testan, 424 U.S. 392, 398, 400 (1976), which was rejected in *Mitchell* (362 U.S. at 216), that the Tucker Act does not

attempt to distinguish *Mitchell* is baseless. It ignores the sweeping language in *Mitchell* (463 U.S. at 218) that a court "need not find a separate waiver of sovereign immunity" with respect to claims against the United States "founded either upon . . . any Act of Congress, or any regulation of an executive department," or based on "any express contract . . . with the United States." Since Petitioner's claims, and those of *amici*, are within the categories of claims described in the Tucker Act, "the waiver of sovereign immunity is clear." Hence, TECA should not have added to the rigors of sovereign immunity faced by Petitioner and should have limited its inquiry, as required by *Mitchell*, to two issues:

1) Whether the EPAA "can be interpreted as requiring compensation." It should be noted that the district courts that have properly followed this Court's directions in *Mitchell* have concluded that small refiners may rely on Section 210 of the ESA and the DOE's Price Regulations as the basis for their substantive right to obtain money damages. *See Wesreco*, slip op. at 21-22 and cases cited at 25; and Pet. at 15-17.

2) Whether Petitioner has otherwise stated a claim based on an express contract with the United States, which it clearly has.

TECA (Pet. App. A at 7a) further seeks to avoid the holding in *Mitchell* with the non-sequitur that "[t]he claim here does not fall within the Tucker Act because Section 211 places jurisdiction of EPAA claims in the district courts." TECA has posed the wrong inquiry. Even though the ESA placed exclusive jurisdiction in the district courts, this did not repeal Petitioner's Tucker Act remedies. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974). Petitioner has cor-

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serve as a broad waiver of sovereign immunity. *McCulloch* thus, in this respect, is in irreconcilable conflict with this Court's subsequent decision in *Mitchell*. *Mitchell*, not TECA's earlier decision, controls this case.

rectly observed (Pet. at 11) that the ESA and the Tucker Act are capable of co-existence. By simply recognizing ESA as a waiver of the Tucker Act's $10,000 jurisdictional limit, TECA could have avoided the artificial conflict it created.

Putting the above to one side, the position taken in this case by both TECA and Interior directly contradicts the unambiguous position previously taken before this Court by Interior in *Mitchell*. Petitioner and *amici* claim, among other things, that Interior has unlawfully exacted their own money by overcharging them for the crude oil they purchased from Interior. This Court stated in both *United States v. Testan*, *supra*, 424 U.S. at 401-02, and in *United States v. Mitchell*, *supra*, 463 U.S. at 223 n.23, that there is "undoubted consent to suit" regarding such claims. *See Eastport Steamship Corporation v. United States*, 178 Ct.Cl. 599, 605-06, 372 F.2d 1002, 1007-08 (1967).[15]

Recognizing the continuing vitality of this rule, Interior conceded in *Mitchell* that:

> Where suit is maintained to require the United States to disgorge a claimant's "money improperly exacted or retained," the statutory predicate need not specify that a right of action for damages is created.

See Brief for the United States at 24 (No. 81-1748).

Furthermore, as this Court noted in *Mitchell* (463 U.S. at 223 n.23), Interior also "assumed" in that case:

> . . . that an action to recover unlawfully high administrative fees may be maintained against the United States as one seeking recovery of "money improperly

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[15] The right of the citizen to recover his own money wrongfully exacted by government officials substantially predates the Tucker Act and is not open to question. *See* Bank of the United States v. Bank of Washington, 30 U.S. (6 Pet.) 8 (1832); United States v. Lee, 106 U.S. 196 (1882); Swift and Courtney and Beecher Co. v. United States, 111 U.S. 22, 29-31 (1884).

> exacted or retained." *United States v. Testan, supra,* 424 U.S. at 401.

Brief for the United States at 33 n.27.

Subsequently, Interior argued that:

> *Eastport Steamship Corp. v. United States, supra,* which was also the basis for the relevant discussion in *Testan, supra,* states unequivocally that claims within this category . . . "must assert that the value sued for was improperly paid, exacted, or taken from the claimant *in contravention of the Constitution, a statute or a regulation.*" Thus, as we noted in our opening brief (page 24, n.17), a statutory basis must be identified that establishes the wrongfulness of the exaction or nonpayment.

Reply Brief for the United States at 7-8 (No. 81-1748), (emphasis added by Interior; citation omitted).

TECA's inexplicable holding that Petitioner is barred from a suit to recover its own money and from recovering its damages resulting from Interior's breach of contract thus conflicts with the very position Interior asserted in *Mitchell,* and with a long and heretofore unquestioned line of decisions of this Court. This, in addition to TECA's total disregard for this Court's reasoning in *Mitchell,* compels the reversal of the decision below.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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et al.

Dated: November 15, 1985

APPENDICES

APPENDIX A

Memorandum [May 15, 1975]

To: Area Oil and Gas Supervisor, Northern Rocky Mountain Area

Through: Conservation Manager, Central Region

From: Chief, Conservation Division

Subject: Applicability of FEA regulations (10 CFR 212.131) to USGS as a "seller" of royalty oil

In answer to your memorandums of December 23, 1974, and April 25, 1975, we have reviewed 212.131 of Part IV of the *Federal Register* dated December 14, 1974, and have had discussions with FEA representatives. Based on this review, we have concluded that under these regulations the USGS should be considered as a seller of oil.

The following procedures should be put into effect immediately by all Area Oil and Gas offices having royalty oil contracts:

A. For a given month, establish the average price paid for old and new crude oil sold in the area. For each royalty oil contract, divide the royalty value by the royalty quantity to determine the average price paid for the oil taken that month. The contract royalty value and royalty quantity are shown in the ADP printout "ROYALTY TAKEN IN KIND."

If we use Casper's "RIK CODE 18 CONTRACT" for the month of February 1975 and assume average area prices of $5.35/bbl. and $10.15/bbl. for old and new oil, respectively, we may use the royalty quantity of 78,923.85 barrels and the royalty value of $544,490.71 to make the following calculations:

1. $$\frac{\$544,490.71}{78,923.85} = \$6.8989/\text{bbl.}$$

If the average price calculated is $5.35 per barrel or less, then all the oil for this contract may be considered as old oil, and no further calculation is needed.

2. Let x=percent of old oil x+y=1
Let y=percent of new oil y=1—x

then, —illegible—

$5.35x+10.15y=6.8989$
$5.35x+10.15(1-x)=6.8989$
$5.35x+10.15-10.15x=6.8989$
$4.80x=-3.2511$
$x=.6773$ or 67.73%
$y=1-x$ or $1-.6773=.3227$ or 32.27%

Thus, old oil sold under the contract for the month is $78,923.85 \times .6773 = 53,455.12$ barrels, and new oil sold amounts to $78,923.85 \times .3227 = 25,468.73$ barrels.

3. Enclosed are EXHIBIT A, showing how the above would be reported on a monthly form, and EXHIBIT A1, showing the ADP "ROYALTY TAKEN IN KIND" printout for RIK 18. Also, enclosed are a few of the blank forms entitled "REPORT ON OLD, NEW, RELEASED AND STRIPPER WELL OIL" that may be reproduced and used in reporting each month to the royalty oil purchasers.

We realize that this procedure of estimating old and new oil does not accurately reflect the old and new oil volumes because of the correction of earlier charges and variations in oil pricing. In addition, this new report will be filed after receipt of the ADP printouts of "ROYALTY TAKEN IN KIND" and will not meet the FEA's deadline. The only other practical procedure for reporting old and new oil would be to separate the input for old and new oil by using an ADP source code for the new

oil. For example, source code 565 shown on the enclosed EXHIBIT A1 could be N65 for new oil, and the regular source code could be maintained for old oil. However, we do not intend to use this procedure unless it is required at a later date because of the additional workload involved and the fact that no internal benefits result from either procedure.

/s/ Russell S. Wayland
Chief, Conservation Division

Enclosures

cc: RCM—Denver
Menlo Park
Metairie
Washington, D.C.

Area Oil and Gas Supervisors

Los Angeles	Tulsa
Metairie	Anchorage
Roswell	Washington, D.C.

OS&D—Denver
CD—Royalty oil contract file (onshore general)
Harris 501-6
EWyatt:WMHarris:05/08/75

UNITED STATES DEPARTMENT OF THE INTERIOR

GEOLOGICAL SURVEY
434 Imperial Office Bldg., 3301 N. Causeway Blvd.
P.O. Box 7944
METAIRIE, LOUISIANA 70011

Tel: (504) 837-4720

March 17, 1976

Memorandum

To: Chief, Conservation Division

Through: Conservation Manager, Gulf of Mexico OCS Operations

From: Oil and Gas Supervisor, Production Control, GMA

Subject: Oil and Condensate Pricing Conflict between FEA and DOI Regulations

Federal Energy Administration Regulations in 10 CFR 212.52, Sales by Federal, State, or local governments, state that "The prices charged for any sale of a covered product by any Federal department, agency, or other instrumentality*** are subject to the price regulations of this part". We have received price bulletins from major producers of crude oil in the Gulf of Mexico Area showing prices for oil in this area effective February 1, 1976, at $5.35 and for new oil $11.53, in compliance with FEA regulations.

We previously have established values under 30 CFR 250.64, many of which were used in valuing oil and billing small refiners under royalty oil contracts. These prices sometimes reflected transportation allowed as a deduction and gathering as an increase in value. We are presently faced with a problem, exemplified by the Rock Island Refinery Corporation royalty oil contract, in which

the differential in amount under our contract and under FEA regulations effective February 1, 1976, is about $20,000 a month. The problem is complicated by the fact that many commingling approvals have established values for the producer/operator which have been carried over to royalty oil contracts; but in many cases no transportation allowance is granted to royalty oil purchasers for the one-sixth royalty interest sold.

If we abide by the FEA regulations we are in violation of 30 CFR 250.64, pertaining to gross proceeds. If we do not follow the FEA regulations, we violate the law.

Please request a solicitor's opinion as to whether our commingling approvals which have been written establishing a value in excess of posted prices (in most cases by adding a gathering allowance) are still legal and applicable, particularly to royalty oil sold under our title 30 CFR 225a regulations.

/s/ LOUIS E. MCBEE
for J.B. LOWENHAUPT

cc: 1.39—Rentals and Royalty
1.39.2—Royalty Oil—General
Accounting 18

GBWoodward:pg

Apr. 19, 1976

Memorandum

To: Assistant Solicitor—Minerals
Division of Energy and Resources

From: Chief, Conservation Division

Subject: Conflict Between Federal Energy Administration (FEA) and Department of the Interior (DOI) Regulations Regarding Oil and Condensate Prices

By Memorandum of March 17 (copy enclosed) from our Metairie office, we were advised of an apparent conflict between the FEA regulations (10 CFR 212.52) and DOI regulations (30 CFR 250.64) regarding oil and condensate prices. Enclosed for your convenience is a copy of the *Federal Register* of February 3, 1976, that includes 10 CFR 212.52 on page number 4939 and an EXHIBIT I that shows 212.52 (FEA), 250.64, and 221.47 (DOI) relative to the value basis for computing royalties.

The second sentence of both the offshore (30 CFR 250.64) and the onshore (30 CFR 221.47) regulations states "Under no circumstances shall the value of production of any of said substances for the purpose of computing royalty be deemed to be *less* than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary." The FEA regulations, 10 CFR 212.52, state that the prices charged for any sale of a covered product by any Federal department or agency are subject to the price regulations herein.

Are we now prohibited from calculating royalties on the gross proceeds accruing to the lease should that value exceed the FEA regulations? In order for us to carry out our responsibilities in accordance with the regulations, we need your immediate legal advice.

The following pertains to some of the problems involved in computing royalties on prices that exceed FEA regulations, retroactive adjustments, etc.:

A. According to the memorandum of March 17 from the Oil and Gas Supervisor, most commingling approvals have been written establishing a value in excess of the posted prices (in most cases by adding a gathering allowance). The current price bulletins for the Gulf of Mexico Area show the oil prices as $5.35 for old oil and $11.53 for new oil, effective February 1, 1976, which are in accord with FEA regulations. Enclosed is the February 1976 Lessee's Monthly Report of Sales and Royalty for lease No. OCS-G-1449 that shows the lessee reported an old oil price of $5.33 per barrel and a new oil price of $11.51 ($5.33 plus $6.18) per barrel. The report also shows a gathering allowance (additional payment) of $0.055 per barrel and a transportation allowance of $0.079826 per barrel. Under the Royalty Quantity column, the report shows that 65,482.32 royalty barrels are taken in kind and sold under royalty oil contract and 2,086.47 royalty barrels are paid for by the lessee. For the royalty oil taken in kind, no transportation allowance is granted because the point of delivery is at the lease, and we have billed the royalty oil refiner at $5.385 ($5.33 plus $0.055) per barrel or $0.035 ($5.385 minus $5.350) per barrel in excess of that permitted by FEA. Also, we have billed the royalty oil refiner at $11.565 ($11.51 plus $0.055 gathering allowance) for the new oil per barrel or $0.035 ($11.565 minus $11.53) per barrel in excess of that permitted by FEA. The lessee's billing is in effect the same as for the royalty oil contract, except the transportation allowance of $0.079826 reduces the price to $5.305174 for old oil and $11.485174 for new oil, neither of which exceeds the prices allowed by FEA regula-

tions. The fact that royalties are being paid by the lessee on a price less than the maximum set by FEA, due to a transportation allowance, does not preclude us from being in violation of the FEA regulations.

Also enclosed are two actual "Summary of Deliveries" from Placid Oil Company to our Metairie office for February 1976. One is for Eugene Island Blocks 296 and 306 that shows the calculation of the oil and condensate net price as $11.7507 ($11.7079 gross price) per barrel for lease Nos. OCS-G-2105 and 2109. This amounts to $0.2207 per barrel more than permitted by the FEA regulations, and oil from lease No. OCS-G-2105 is sold under royalty oil contract. The other summary is for South Marsh Island Field 269 and shows an average net price calculation of $11.7398 ($11.5863 gross price) per barrel applicable to lease Nos. OCS-G-2310, 2311, and 2600. This amounts to $0.2098 per barrel more than permitted by FEA regulations. Said increases are due to pipeline tariff, transportation allowance, and the GRAVCAP ADJUSTMENT for gravity and sulfur.

B. FEA regulations (page 4940) part 212.72, paragraphs (2) and (3) with respect to new crude oil state:

"(2) Effective February 1, 1976, the total number of barrels of domestic crude oil produced and sold in a specific month, less (A) the property's base production control level for that month and less (B) the current cumulative deficiency since February 1, 1976; and

(3) Shall not in either period include any number of barrels not certified as new crude oil pursuant to the provisions of part 212.131(a)(1) within the consecutive two-month period immediately succeeding the month in which the crude oil is pro-

duced and sold, except where such recertification is explicitly required or permitted by FEA order, interpretation, or ruling."

Pages 4940 and 4941, part 212.74, paragraph (d) states as to retroactive increase in price that "No producer may charge or accept a retroactive increase in price for crude oil. Retroactive increase in price means any price charged or offered after the close of the calendar month in excess of the highest price prevailing for that grade of crude oil, in first sales between the producer and the purchaser of the domestic crude oil, during the calendar month in which it was produced and sold."

Enclosed is a copy of a letter dated March 18, 1976, from Standard Oil of California to our Alaska office, which shows *retroactive changes in royalties* due to a change in classification of oil from "old" to "new." This does not necessarily reflect a retroactive increase in price. Also enclosed is a copy of a letter dated March 5, 1976, from Mohawk Petroleum Corporation to our Alaska office, *objecting to retroactive adjustments* under their royalty oil contract and quoting the FEA regulations. The Alaska office has advised us that this matter with Mohawk has been resolved. We believe that most of our problems with prices and retroactive adjustments will be with the royalty oil purchasers. For example, transportation costs per barrel are determined from cost statements in a large number of cases after the total costs are determined for the calendar year. This requires retroactive adjustments to the value basis on which royalties are computed, and if the transportation costs are less than that previously allowed, we could be calculating royalties on a price in excess of the price allowed by FEA.

C. 30 CFR, part 225.a3, states that a charge for cost of administration of an account equal to one-half per-

cent of the market price will be made for each barrel of OSC royalty oil sold. We have been advised by an FEA auditor, that has been working in our Metairie office, that FEA considers the one-half percent additional charge as an increase in the price of oil under our royalty oil contracts, which may be in excess of the posted prices allowed by the current FEA regulations. The FEA auditor plans to make a report to FEA thereon.

D. To assist you in your review, some other information regarding the value basis for computing royalties follows and is enclosed for your ready reference:

1. Conservation Division Manual, Onshore Oil and Gas, Product Value—Oil and Condensate, dated May 17, 1974.
2. Director's Decision GS-60-O&G, dated October 11, 1974.
3. NOTICE to Lessees and Operators from the Tulsa Oil and Gas Supervisor, dated November 12, 1973.
4. Memorandum dated October 31, 1973, to the Conservation Managers, along with the Solicitor's memorandum of August 8, 1973.
5. IBLA 70-123 Decision of July 18, 1973.
6. Director's Decision GS-50-O&G, dated October 27, 1972.
7. Director's Decision GS-48-O&G, dated November 8, 1971.
8. Director's Decision GS-43-O&G, dated August 10, 1971.
9. Page from Mr. Dole's letter of January 26, 1971, to Mr. John Whittier of White House.

10. Letter of May 6, 1969, to Union Producing Company from Tulsa Oil and Gas Supervisor pertaining to tax reimbursement as being part of the gross proceeds.

11. Memorandum of October 7, 1965, to Tulsa Oil and Gas Supervisor from Chief, Branch of Oil and Gas Operations, with a subject "Tax reimbursements as an item comprising gross proceeds in sale of gas."

12. Solicitor's Decision A-29460, dated August 2, 1963.

13. Letter of February 8, 1963, to Honorable Bob Dole from Director.

14. Memorandum of November 8, 1961, to Tulsa Oil and Gas Supervisor from Chief, Branch of Oil and Gas Operations, together with incoming correspondence.

15. Old Branch of O&G Operations Manual, Chapter 3.1A(S47), dated March 31, 1961.

16. Director's Decision GS-22-O&G, dated May 20, 1957.

17. Memorandum of July 11, 1956, to Tulsa Oil and Gas Supervisor from Chief, Oil and Gas Leasing Branch.

18. Memorandum to Director, dated June 19, 1956, from Associate Solicitor.

19. Director's Decision GS-18-O&G, dated December 18, 1954.

20. Letter of July 26, 1941, from Acting Chief, Oil and Gas Leasing Division.

According to our Metairie office, a large number of lessees, operators, and royalty oil purchasers are paying royalties on prices that exceed the posted prices allowed

by FEA regulations. We do not plan to change our billing procedures until advised by your office on the foregoing.

RUSSELL S. WAYLAND
Chief, Conservation Division

Enclosures

cc: OS&D—Denver w/o encl. 1-20
Wyatt w/o encl. 1-20
Harris w/o encl.
Krahl w/o encl. 1/20

CD Files (GS-508-C)—MS 650
Desk Files (ABC-O) (WME)
WMHarris:ERWyatt:JDuletsky:kfn:04/16/76
860-7511

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUL 31 1976

Memorandum

To: Chief, Conservation Division, Geological Survey

From: Assistant Solicitor—Minerals, Division of Energy and Resources

Subject: Conflict Between Federal Energy Administration and Department of the Interior Regulations Regarding Oil and Condensate Royalty Valuation

Introduction

Sections 14 and 17(b) of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 223, 226(b) (1970) and section 8(b)(3) of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1337(b)(3) (1970), require that royalties be a certain percentage "in amount or value of the production" from the lease. The regulations implementing these statutes which govern the computation of royalties for oil and gas leases provide in part:

> The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. *Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee*

> *from the sale thereof* or less than the value computed on such reasonable unit value as shall have been determined by the Secretary * * *. 30 CFR 221.47, 250.64. (Emphasis added)

The FEA regulations setting upper and lower tier price ceilings on crude oil provide in part:

> The prices charged for any sale of a covered product by any Federal department, agency, or other instrumentality, including any wholly owned Government corporation as defined in the Government Corporation Control Act of 1945, as amended, and by State and local governments are subject to the price regulations of this part * * *. 10 CFR 212.52, 41 F.E. 4939 (February 3, 1976).

[Portion of Memorandum Omitted by DOI Prior to Release]

"Gross Proceeds"

Within the context of 30 CFR 221.47 and 250.64, the term "gross proceeds" has been defined to mean:

> "[T]he established field price for the natural gas plus any additional sums paid by the purchaser of the gas to the unit operator as consideration for the purchase of gas from the unit of which the federal lease is a part." *Wheless Drilling Co.*, 80 I.D. 599, 603 (1973).

In *Wheless*, the Board of Land Appeals held that the Department properly charged royalties based on the price received by the lessee for its natural gas plus a partial reimbursement from the buyer to the lessee for the state severance tax paid by the lessee on the gas.

The *Wheless* case is consistent with an earlier departmental decision holding that gross proceeds include reimbursement by the buyer to the lessee of the lessee's share

of royalty due the United States arising from the [rest of copy missing; cut off page].

Kerr-McGee Oil Industries, Inc., 70 I.D. 464 (1963). The Secretary held in Kerr-McGee that "[w]ith the reimbursement provision they are receiving an additional compensation for the production of their leases." 70 I.D. at 470.

In a similar case, the Secretary affirmed a Geological Survey decision basing natural gas royalties on the entire price paid by the buyer to the lessee, in spite of the lessee's contractual obligation "to pay to the buyer, or to such other person as the buyer may direct, one cent per Mcf toward the cost of increasing the pressure of gas delivered to 500 psig prior to delivery into the buyer's main transmission facilities." *Big Piney Oil and Gas Co.*, A-29895 (July 27, 1964), at 2. The lessee unsuccessfully argued that the royalty should be based on the purchase price minus the repayment to the buyer for compression. Although the decision was based on a strict interpretation of the contract of sale rather than an interpretation of the term "gross proceeds", it nevertheless illustrates the general proposition that the United States is not bound by the actual price received by a lessee in establishing a value base for royalties, but rather is entitled to royalties based on the reasonable market value of the oil produced. *Cf. Continental Oil Co. v. United States*, 184 F.2d 802 (9th Cir. 1950); *Husky Oil Co.*, A-27168 (November 26, 1956).

[Portion of Memorandum Omitted by DOI Prior to Release]

Reconciling the Regulations

The general rule is that the provisions of varying statutes should be reconciled to the extent of any conflict. *Maiatico v. United States*, 302 F.2d 880 (D.C. Cir. 1967). *Cf. McGinnis Theaters v. Video Ind. Theatres, Inc.*, 262

F.Supp. 607.613-14 (M.D. Okla.), *aff'd*, 386 F.2d 592 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). If the conflicting provisions are irreconcilable, then the most recent prevails. *Inter-Continental Promotions, Inc. v. MacDonald*, 367 F.2d 293, 301 (5th Cir. 1966), *cert. denied*, 393 U.S. 834 (1968). These and other rules of statutory construction are equally applicable to administrative regulations. *Miller v. United States*, 294 U.S. 435 (1935); *Rucker v. Wabash R. Co.*, 418 F.2d 146 (7th Cir. 1969).

This approach follows the reasoning in *Mohawk Petroleum Corp. Inc. v. Department of the Navy*, 395 F.Supp 933 (C.D. Cal.), *aff'd* 521 F.2d 1394 (T.E.C.A. 1975). The *Mohawk* case involved a conflict between a provision of the Armed Forces Act, requiring that sales of oil and gas from naval oil reserves go to the highest qualified bidder (10 U.S.C. § 7430 (1970)), and the FEA price ceiling regulations (10 CFR Part 212). Mohawk sued to enjoin the Department of the Navy from selling oil to a company whose bid exceeded the ceiling price imposed by the FEA regulations. In issuing an injunction prohibiting the Navy from selling its oil at a price in excess of the FEA ceiling, the district court noted that there was no evidence of Congressional intent to exempt sales of crude oil from Naval reserves from price regulations promulgated under the Emergency Petroleum Allocation Act, 15 U.S.C. § 715 et seq. (1974 Supp.). 395 F. Supp., at 935. In addition, the court noted that 10 U.S.C. § 7430 is "an administrative provision respecting the determination of price on sales of crude oil and gas by the Navy, and as such is superseded by the price controls provided by the Emergency Petroleum Allocation Act and regulations pursuant thereto." *Id.* at 936.

In affirming the district court, the Temporary Emergency Court of Appeals observed that the imposition of FEA price controls on the sale of crude oil from Naval reserves did not frustrate the conservation, protection,

and testing of oil in the Naval Petroleum Reserve. 521 F.2d at 1395. As a result, to the extent that application of 10 U.S.C. § 7430 resulted in conflict with the FEA price ceilings, the FEA regulations were to prevail.

Conclusion

The Department of the Interior is charged with administering oil and gas leases on Federal lands and promoting the production and conservation of petroleum, at the same time reserving a royalty based on the value or amount of production from the lease. This purpose would not be frustrated by valuing royalty oil at a price not in excess of the ceiling set by the FEA regulations. This would not necessitate a complete redefinition of the term "gross proceeds," but rather would merely mean that if the gross proceeds received by a lessee were in excess of the FEA ceiling price, the value basis for the royalty would be the ceiling price. Otherwise, the royalty would be based on the gross proceeds received by the lessee.

Although the foregoing approach will result in technical violations of 30 CFR 221.47 and 250.64, it is not inconsistent with the statutory mandate to compute royalties from oil and gas production on the basis of the "amount or value of the production." 30 U.S.C. §§ 223, 225(b) (1970); 43 U.S.C. § 1337(b)(3) (1970). In addition, as the price ceilings change or are lifted entirely, the assessment of royalties based on the longstanding interpretation of "gross proceeds" can continue unimpaired, without the need for repeated redefinition of the term.

Frederick N. Ferguson

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum August 23, 1976

To: Acting Chief, Conservation Division, Geological Survey

From: Assistant Solicitor—Minerals, Division of Energy and Resources

Subject: FEA regulations

We have reviewed the memorandum of July 16, 1976, from the Oil and Gas Supervisor, Production Control, Gulf of Mexico Area to the Acting Chief, Conservation Division concerning various conflicts between Federal Energy Administration (FEA) price regulations and Geological Survey royalty regulations and procedures.

The FEA regulations specifically provide that:

> The prices charged for any sale of a covered product by any Federal department, agency, or other instrumentality * * * are subject to the price regulations of this part * * *. 10 CFR 212.52

Thus, it would appear that to the extent that the Survey is involved in the sale of royalty oil, the valuation of and billing for that oil is subject to the FEA regulations. As we noted in our memorandum to the Chief, Conservation Division of July 30, 1976, the valuation of royalty oil cannot exceed the ceiling price set by the regulations.

Frederick N. Ferguson

May 5, 1977

MEMORANDUM FOR THE FILE

FROM: Carl A. Corrallo

SUBJECT: Meeting With U.S. Geological Survey Representatives

On May 2, 1977, Paul Bloom, Deputy General Counsel, and I met with representatives of the United States Geological Survey, including Ms. Karen A. Shaffer, a senior attorney from the Department of Interior, Office of the Solicitor. The meeting was called by Mr. Bloom to discuss the intentions of the U.S. Geological Survey and the Department of Interior with respect to their compliance with FEA regulations in the sale of royalty crude oil produced on leases owned by the federal government. Mr. Bloom explained to the U.S.G.S. representatives that certain information regarding U.S.G.S. had come to our attention by way of audits and investigation conducted by Region VI personnel in Louisiana and Texas and by way of U.S.G.S. involvement in the exceptions and appeals procedures associated with the payment of royalties to U.S.G.S. That information suggests that U.S.G.S. either did not consider itself to be subject to the jurisdiction of the Federal Energy Administration regulations or was disregarding the requirements of those regulations.

Specifically I pointed out that in sales of crude oil by U.S.G.S., the prices charged were in excess of the ceiling price. This was the result of U.S.G.S. calculating the price for such crude oil by reference to the average prices charged by the operator of the property from which the crude oil was produced and then adding a ½ percent fee to cover both transportation and administrative costs incurred in such sales. Further, notwithstanding our regulatory requirements that sellers of crude oil certify whether such crude oil is upper tier or lower tier crude oil, U.S.G.S. was providing estimates of the mix

of the crude oil they sold by reference to the mix of the property from which it was produced, without regard to any determination as to the classification of the particular crude oil being sold. In some cases, U.S.G.S. was providing no certifications at all. These violations appeared to be clear cut and extremently [sic] troublesome to FEA, given our mandate from the Congress to impose regulations on all crude oil produced in or imported into the United States.

Ms. Shaffer and U.S.G.S. representatives suggested that the mandate of the statute which provided the Secretary of Interior with the authority to administer federal oil leases clearly required that crude oil produced from such leases be "valued" with respect to the market prices and also required the recovery of certain administrative costs associated with the sale of such crude oil. They advised that U.S.G.S. took crude oil in kind to satisfy its royalty interests, although such transactions were on paper only, *i.e.* U.S.G.S. never took physical possession of the crude oil. In other circumstances, the operator merely pays U.S.G.S. a sum representing a 1/6 interest in the total proceeds received in the sale of the crude oil produced from the property.

U.S.G.S. suggested that this statutory authority of the Secretary of Interior displaced or superseded the authority vested in the President and the Administrator of the FEA by the Emergency Petroleum Allocation Act. Mr. Bloom and I took exception to this reading of the statute and indeed indicated quite strongly that it was our view that the Allocation Act imposed a requirement on the administration of these federal leases to conform with FEA regulations. We suggested that the distinction between the U.S.G.S. taking crude oil in kind as opposed to receiving a royalty interest payment was a meaningless one for the purposes of our regulations. Ms. Shaffer disagreed. She pointed out that in the case of the operator who had received exception relief in the form of per-

mission to certify certain volumes of lower tier oil as upper tier oil in order to garner sufficient revenues to economically maintain the operation, the statute and regulation required that operator to pay a portion of that increased revenue to the U.S.G.S. as royalty interest owner. This was notwithstanding that the exception relief afforded specifically excluded the royalty interest owners from participation in this relief. Ms. Shaffer was somewhat more hard pressed to justify her position with respect to U.S.G.S.'s sales of crude oil to third parties and indicated that she, after conversations with the other representatives, would reconsider the U.S.G.S. position with respect to FEA regulations and advise us of their decision. It was discussed and contemplated that this decision might eventually be made at a substantially higher level within both our organizations before the conflict could be completely and satisfactorily resolved.

[Portion of Memorandum Omitted by DOE Prior To Release]

FEDERAL ENERGY ADMINISTRATION

Jul. 6, 1977

Ms. Karen A. Shaffer
Department of Interior
Office of the Solicitor
Washington, D.C. 20240

Dear Ms. Shaffer:

On May 2, 1977, you and representatives of the United States Geological Survey ("USGS") met with me to discuss the apparent conflict between the USGS's practices in the sale of royalty crude oil produced on leases owned by the federal government and the requirements of FEA's crude producer price regulations. We engaged in a lengthy discussion in which you and I exchanged our perceptions of the requirements of the underlying statutes from which our respective agencies derive their authority and the applicable FEA and Interior Department regulations. Although no resolution of the conflicts between us was achieved, it was my understanding that you had agreed to reduce your position to writing and transmit that position to me. In this way we could begin the process of review of our respective legal views of this matter in order to eventually achieve a resolution of this conflict between USGS and FEA which continues to plague the enforcement operations of this agency. Unfortunately, I have yet to receive any such communication.

I cannot impress upon you enough the need for the conflict between our agencies to be resolved. If we are unable to expeditiously progress towards some resolution of this matter by an exchange of letters, I believe that the agency will have no choice but to proceed against the USGS in the context of a formal compliance action. While I do not perceive this as the most desirable method to approach this problem, I am nonetheless constrained by the man-

date of our enabling statutes to initiate some action against USGS. Please advise me as to your intentions in this matter so that FEA may determine its appropriate action with a complete understanding of your position.

Sincerely,

Paul Bloom
Deputy General Counsel

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Oct. 21, 1977

Memorandum of Law

Subject: The Secretary's power to modify his authority with regard to royalty on oil and gas to accommodate the FEA's policy objectives with regard to price regulation

This opinion is written in response to questions raised by the Federal Energy Administration (FEA), various federal oil and gas lessees, and refiners holding federal royalty oil contracts regarding the Department's collection of royalty pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. §§ 181-287) and the OCS Lands Act (43 U.S.C. §§ 1331-1343).

The controversy between the FEA and the Department of the Interior has arisen, in the first instance, from attempts by the U.S. Geological Survey (USGS) to collect royalty due under federal onshore and offshore oil and gas leases and royalty oil contracts in accordance with statutes, the Secretary's regulations, lease terms, and royalty oil contracts. Fundamentally, FEA's position is that the lessees and refiners are released from certain royalty obligations on oil due to the overriding authority of FEA's price regulations. The FEA has advised federal lessees and refiners that they are so released. This advice has resulted in a number of appeals being filed by lessees and refiners with the USGS in protest of USGS's continuing attempts to collect royalty due under the lease terms, royalty oil contracts, and the Secretary's regulations.

The legal question raised by this conflict between the Department and FEA is whether the Secretary of the In-

terior may waive or modify his authority with regard to royalties on production from oil and gas leases issued pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. §§ 181-287), the Mineral Leasing Act for Acquired Lands (30 U.S.C. §§ 351-359), and the OCS Lands Act (43 U.S.C. §§ 1331-1343), to accommodate the FEA Administrator's accomplishment of FEA's policies and objectives and exercise of his authority to establish ceiling prices for any first sale of crude oil produced in the United States pursuant to the Emergency Petroleum Allocation Act, as amended (15 U.S.C. § 751, *et seq.*).

The Secretary is charged with the responsibility for setting the royalty for oil and gas leases issued pursuant to section 8 of the OCS Lands Act (43 U.S.C. § 1337) at "not less than 12½ per centum in amount or value of the production saved, removed or sold." Similarly, under section 17 of the Mineral Leasing Act of 1920 (30 U.S.C. § 226), the Secretary is responsible for fixing the royalty for competitive leases issued pursuant to that section at "not less than 12½ per centum in amount or value of the production removed or sold from the lease." [1] For purposes of simplicity, we will assume a royalty rate of 12½ per centum throughout this opinion. This constitutes the Secretary's basic statutory authority for the collection of royalty and the authority through which the Secretary determines the production upon which royalty accrues and the value of that production for royalty purposes. By statute, the Secretary is also responsible for the sale of royalty oil (taken in kind or "amount") (30 U.S.C. § 192; 43 U.S.C. § 1334) and for granting relief to lessees from royalty requirements (30 U.S.C. § 209; 43 U.S.C. § 1334).

As far as all these royalty functions are concerned, there is no indication in the Emergency Petroleum Allocation

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[1] Under 30 U.S.C. § 226, the royalty rate for noncompetitive leases is fixed at 12½ per centum.

Act (EPAA), 15 U.S.C. §§ 751-756, as amended by the Energy Policy and Conservation Act (EPCA), 89 Stat. 871, 941, that the statutory obligations of the Secretary with respect to royalty have been substantively, modified or transferred to the FEA's jurisdiction except as provided in the Department of Energy Organization Act (91 Stat. 565).[2] However, it is clear that the authority of the FEA Administrator to establish ceiling prices applicable to any first sale of crude oil in the United States (Sec. 8 EPAA, 89 Stat. 942) has a bearing on the Secretary's valuation of oil for royalty purposes.

At this point, a closer examination of the Secretary's statutory obligations with respect to the administration of the royalty requirements is in order.

Specifically, there are at least four identifiable points of controversy which are addressed individually in this memorandum: (1) the production on which royalty accrues, (2) the valuation of production when royalty is taken "in amount or value," (3) the timing of adjustments to billings for royalty, and (4) the administrative charge collected from refiners when royalty is taken in kind.

PRODUCTION ON WHICH ROYALTY ACCRUES

The key statutory provisions are those mentioned above which provide for a royalty of 12½ per centum in "amount or value" of production saved, removed or sold from the lease. In the Solicitor's Opinion of October 4, 1976 (M-36888) and addenda thereto (M-36888 Supp. I and Supp. II) interpreting the royalty provisions of the Mineral Leasing Act and the OCS Lands Act, the Solicitor concluded that royalty is due on all production, i.e., all oil or gas withdrawn from a reservoir. (Copy attached) The Solicitor concluded that this interpretation is com-

[2] The effect of the transfer of functions under this Act is discussed in the latter portion of this opinion.

pelled by the statutes. (*See, Effect of October 4, 1976 Solicitor's Opinion M-36888*, March 9, 1977, M-36888 Supp. II.) Thus, when royalty is taken in amount or value, as the statutes provide, the royalty accruing to the United States is not less than 12½ percent of the value or the amount of *all* oil or gas withdrawn from the reservoir. *See, The Texas Company*, A-22010, January 15, 1953.

By decision dated January 26, 1977 (FEA-0850 and FEA-0926), the FEA purports effectively to permit a federal onshore oil and gas lessee, M. J. Mitchell, to sell 76.66 percent of his production at upper tier prices, the remainder at lower tier prices, and allow him to pay royalty to the United States as if his entire production were sold at lower tier prices. This decision, if allowed to stand, would result in the lessee paying royalty on less than the value of the entire production, thereby reducing the amount of royalty payable to the United States on production from the lease by approximately one-half. We think the holding of the FEA with respect to the payment of royalty oil is beyond the jurisdiction of the FEA and results in the payment of royalty on a basis contrary to that required by statute. Further, we believe the Secretary would not be properly performing his statutory duties with regard to royalty should he accept the outcome of the FEA decision.

When taken in money, our view of the statutory requirements is that the royalty must be based on the value of the *entire production*, not just 23.34 percent of it. Valuation is discussed below, but for purposes of the example contained in the next sentence, we will assume price equals value. So, if the Secretary were to value the entire production as if it were all sold at the lower tier price as FEA would require, the United States would receive approximately one-half the royalty it would receive if valuation were based upon the actual value or sales price of the entire production, i.e., valuing 77.66

percent at the upper tier price and 23.34 percent at the lower tier price. Attached is a chart demonstrating the principle.

It is important to understand how the FEA reached the conclusion it did in the *Mitchell* case. On April 2, 1976, the FEA granted M. J. Mitchell exception relief from the provisions of 10 CFR Part 212, Subpart D (which establishes the ceiling price for old crude oil) and thereby permitted him to sell 76.66 percent of the crude oil produced from the Minnelusa Sand Unit in the Pickrel Ranch Field, Campbell County, Wyoming, at upper tier prices. (*M. J. Mitchell*, 3 FEA Par. 83,146 (April 2, 1976)). The relief was granted because Mitchell could not continue economically to operate the unit if compelled to sell the oil production at lower tier prices. The decision purported to limit the exception relief to the working interest owners only and to forbid royalty interest owners from basing their royalty share on the increased value of the production. The reason for doing so was expressed in terms of economics:

> Consequently, the objectives of maintaining an economic incentive to continue production from a property would not appear to be furthered by approving exception relief for the royalty interest owners, who have neither incurred increased costs nor experienced an economic disincentive to maintain production. (at 7)

This decision and statement indicates a misconception on FEA's part of the nature of the United States' royalty interest, the requirements of existing law with regard to royalty, and the authority of the FEA over royalty in general and to grant royalty relief in particular.

FEA's explanation of its actions contained in its appeal decision [3] sheds further light on the misunderstanding be-

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[3] FEA-0850, FEA-0926 Decision and Order of the Federal Energy Administration, January 26, 1977 [hereinafter, Appeal Decision].

tween FEA's and the Department's authority. It is clear from the decision (at 4) that FEA's chief concern was with the achievement of its statutory duty to

> establish ceiling prices (or the manner of determining ceiling prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month . . . shall not exceed a maximum of $7.66 per barrel . . . . Sec. 8(a) EPAA, 89 Stat. 942.

The granting of relief to Mitchell was clearly in conformance with FEA's statutory authority to grant price relief when necessary to take into account declining production and to provide an incentive to obtain optimum production (Sec. 8(b) (2), EPAA, 89 Stat. 942). However, in granting the price relief, the FEA also purported to grant royalty relief based on the view that (1) the United States only takes royalty in kind and thus is not affected, (2) the royalty interest owner has no operating expenses, therefore it does not qualify for exception relief, (3) if the United States based its royalty share on the increased value of the production, the effectiveness of FEA's relief to the operator would be diminished and the achievement of Congressional policy objectives would be thwarted. The latter would occur because FEA would have to permit more of the oil to be sold at upper tier prices to provide the operator with effective relief from operating costs, of which FEA viewed royalty to be a part.

The FEA's decision is based upon a number of assumptions about its legal authority which override what we view as statutory obligations the Secretary may not relinquish or modify. What follows is an examination of those assumptions.

1. The first assumption that the FEA makes in its decision is a factual one:

> As a general matter royalty owners have an actual interest only in the *crude oil* produced from their properties rather than in the *proceeds* which accrue to the working interest owner from the sale of the crude oil production. Consequently, most lease agreements assess a royalty based upon a fraction of the total production of crude oil rather than upon revenue actually accruing to the working interest owner. (emphasis added)

It is well established that the language "in amount or value" as contained in section 17 of the Mineral Leasing Act of 1920 (30 U.S.C. § 226) and section 8 of the OCS Lands Act (43 U.S.C. § 1337) provides the Secretary of the Interior with the authority and the option to take royalty in amount or in value at his discretion. This view is further borne out by section 36 of the Mineral Leasing Act (30 U.S.C. § 192) which provides "all royalty accruing to the United States under any oil or gas lease or permit under this title *on demand* of the Secretary of the Interior shall be paid in oil or gas." (emphasis added) Standard oil and gas lease terms for federal lands generally reflect the position that royalty is taken in kind or in value at the Secretary's option. Therefore, contrary to the FEA's assertion that the ruling in the *Mitchell* decision would not adversely affect the United States as a royalty interest owner because royalty is taken in kind, it is clear that the United States' interest may be and often is taken in value and thus is clearly affected by the ruling in the FEA decision. This is so since, as we have explained earlier, the amount of royalty accruing to the United States pursuant to the FEA decision when taken in value is nearly one-half the amount of royalty it would normally collect in accordance with the statutory requirements of the Mineral Leasing Act and the OCS Lands Act, the Secretary's regulations, and the lease terms.

In essence, the FEA makes two legal assumptions, one explicitly and one implicitly. The explicit assumption is that the FEA has the authority to modify the terms of an oil and gas *lease* which prevent the accomplishment of the policy objectives set forth by the Congress in the Emergency Petroleum Allocation Act of 1973, as amended. The implicit assumption is that the FEA also has the authority to modify the terms of the *statute* providing for royalty of "12½ per centum of the amount or value of the production of oil and gas removed or sold" from a federal oil and gas lease.

We believe that the FEA's authority in the first instance is limited to specific situations outlined by Congress in the EPAA.

For its conclusion in the *Mitchell* decision that the FEA may breach a contract in the interest of pursuing the objectives of section 4 of the EPAA, the FEA relied upon section 6(c)(5).[4] That section provides:

> There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this chapter or with the regulation or any order under section 753 of this title.[5]

Section 753 is section 4 of the EPAA and basically provides the authority for the FEA to achieve certain Con-

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[4] Appeal Decision, at 4.

[5] Section 6(c)(5) was broadened in the amendments to the EPAA by deleting reference to the antitrust laws and amending the phrase "under section 753 of this title" to read "under this Act." The analysis we make herein remains unaffected by the change.

gressional policy objectives which are spelled out in that section.

It is important to note that section 6(c)(5) limits the authority of the FEA to breach a contract only in regard to the provision for failure to offer for sale or exchange crude oil, residual fuel oil or any refined petroleum product. In other words, the section goes to the question of delivery of oil, not to the question of breaching a contract in such a manner as to breach the royalty obligation owed by the lessee to the royalty interest owner, particularly to the United States.

Thus, the FEA's pursuit of objectives spelled out in section 4 of the EPAA does not justify the breach of contracts in every instance, but only in instances involving the delivery of oil.

Clearly the achievement of the Congressional policy objectives in section 4 of the EPAA cannot be used in such a broad sense as to provide a reason for, in effect, abrogating federal lease terms which reexpress the statutory option of the Secretary to take royalty in kind or in value. Hence, FEA's explicit assertion that the FEA may by regulation supersede the statutory obligations of the Secretary of the Interior must be based on some other grounds than the EPAA statutory provisions for the breach of contracts.

The question raised is whether Congress intended its delegation of authority to the President (then to the FEA Administrator under the EPAA) and listing of policy objectives and prescription of his duties in the EPAA, as amended, to supersede the obligation of the Secretary of the Interior with regard to royalty as set forth in the Mineral Leasing Act of 1920 and the OCS Lands Act. Congress explicitly provided in section 6 of the EPAA for a declaration of the impact of the EPAA on other laws. Preemption is discussed with respect to state or local allocation regulations and orders, actions taken un-

der the Economic Stabilization Act of 1970, and the relationship of the antitrust laws to the enactment of the EPAA. However, there is no discussion in the EPAA as to the effect of this law on the Mineral Leasing Act of 1920 or the OCS Lands Act.

It is a well-known rule of statutory construction that where two statutes seemingly deal with the same subject matter, they should be read insofar as possible to be consistent with each other and not to permit the implied repeal of the earlier law. There is no indication in the EPAA, as amended, that the statutory obligations under the Mineral Leasing Act of 1920 and the OCS Lands Act with regard to royalty accruing to the United States on federal oil and gas leases are modified by the provisions in the EPAA, as amended, which give the President the authority to allocate crude oil and regulate the prices thereof in accordance with economically related objectives of insuring the appropriate allocation and pricing of oil nationally.

Therefore, we do not believe that the FEA Administrator may by regulation modify the statutory provisions of the Mineral Leasing Act of 1920 and the OCS Lands Act which require the performance of certain royalty functions. It is our view that the authority of the Secretary under the Mineral Leasing Act of 1920 and the OCS Lands Act with regard to royalty is compatible with the exercise of the FEA Administrator's authority to allocate oil and to establish ceiling prices therefor.

2. The second assumption of the FEA decision in the *Mitchell* case relates to the production on which royalty accrues and the valuation of that production for royalty purposes. The ruling in the *Mitchell* case mostly affects the United States' royalty share when royalty is taken in value at the option of the Secretary. We have already discussed our view that when royalty is taken in value or in amount that the royalty accrues on all production,

or in other words, all oil and gas withdrawn from the reservoir. When taken in value, this means that royalty, by the terms of the statute, is due on the value of all the production. As we pointed out earlier, the Secretary is compelled by the statute to collect royalty in this manner. The effect of the FEA decision is to prevent the Secretary from carrying forward his statutory obligations. This is because, as we have seen, royalty under the *Mitchell* decision would have to be calculated at the value attributable to 23.34 percent of the production. This is contrary to the statutory directive to collect royalty on the value of all production, even though the Secretary has the discretion to establish a reasonable value of the production under both the Mineral Leasing Act of 1920 and the OCS Lands Act. *United States v. Ohio Oil Co.*, 163 F.2d 633, 639-641 (10 Cir. 1947).

Thus, the holding of the FEA in the *Mitchell* case permitting the lessee to pay royalty to the United States as if its entire production were sold at lower tier prices is not in accordance with the dictates of the Mineral Leasing Act. In our view, the statute requires that royalty be based on the value of the entire production, not just the value attributable to 23.34 percent of it. A discussion of the valuation of production appears later in this paper.

3. The argument the FEA makes in its *Mitchell* decision that the royalty interest owner has no operating expenses and therefore does not qualify for exception relief is not relevant to the issue at hand. The statutory royalty obligations of the Secretary are separate from the lessee's obligations under the statute and the lease to develop his lease and produce oil and gas. The FEA's view reflects a clear misunderstanding of the nature of the royalty interest held by the United States. Royalty payments are consideration for the taking of oil or gas once a lease has reached production status. By statute, without the payment of royalty called for by the lease, the lessee's rights under the lease are subject to cancellation.

Royalty is not merely an operating expense, but the foundation for the contractual right to produce oil or gas owned by the United States.[6]

4. The fourth assumption is that the FEA, when considering granting price relief to a lessee, has authority effectively to reduce the royalty obligation of the lessee. It is true that the ability of the lessee to pay royalty is related to the price he can obtain for his production and his operating expenses. But statutorily the royalty obligation set forth in the Mineral Leasing Act and the OCS Lands Act is separate from the regulation of prices by the FEA. The FEA has no statutory authority to regulate or limit the royalty interest of the United States in attempting to reach its price regulation obligations.

It is clearly conceivable that a lessee's operations could become so marginal that the amount of royalty accruing to the United States would make a difference in whether or not he could continue to produce oil or gas. Since oil prices became regulated under the EPAA, as amended, two remedies have become available to the lessee for relief in this situation. The first remedy is to seek price relief from the FEA. The price relief may be based upon consideration of operating expenses including the royalty obligation. However, the only form of relief FEA may offer is an increase in prices or volume of oil which may be sold at the upper tier prices tailored to meet the operator's specific needs.

The royalty obligation itself may be *reduced* only by the Secretary of the Interior pursuant to specific provisions of the Mineral Leasing Act and the OCS Lands Act (30 U.S.C. § 209; 43 U.S.C. § 1334). Thus, a second and

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[6] "*Royalty Expense* represents the percentage of the gross receipts which a producer must pay to the landowner for the privilege of extracting from the reserves underlying his land." *Shell Oil Company v. Federal Power Commission*, 520 F.2d 1061, 1068 (5th Cir. 1975).

separate remedy is provided a lessee whose operations have become marginal. Although the FEA argues in the *Mitchell* case that permitting the United States to base its royalty share on the increased value of the production would decrease the effectiveness of FEA's price relief to the operator because the operator's royalty obligation would be increased accordingly, the appropriate remedy provided by law to the operator for relief from the increased burden is to request relief under 30 U.S.C. § 209 or 43 U.S.C. § 1334, from the Secretary of the Interior. Making full use of these provisions, FEA need not feel that it is compelled because of the additional royalty burden to thereby grant a greater increase in prices or increase in the amount of production for which it grants exception relief. On the other hand, FEA could achieve its economic incentive objectives by considering the incremental royalty cost to the producer in the computation of price relief.

We find no authority for the view that the FEA or the Secretary of the Interior may, by regulation, modify the explicit provisions giving the Secretary authority to reduce royalty which are contained in section 39 of the Mineral Leasing Act (30 U.S.C. § 209):

> The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, . . . and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold . . . whenever in his judgment it is necessary to do so in order to promote development or whenever in his judgment the leases cannot be successfully operated under the terms provided therein.

The position taken by the FEA in the *Mitchell* case that the FEA's authority to regulate price includes the authority to control the amount of royalty paid to the

United States is similar to the position it took in the case of *Shell Oil Company v. Federal Energy Administration, et al.*, 400 F.Supp. 964 (S.D. Texas, 1975). In that case, the FEA asserted it had the authority to regulate rents charged to service station operators on the theory that rents are so inextricably interwoven with prices paid for gasoline that regulation of prices would be frustrated unless the FEA also had the authority to control the rents charged. The court disagreed. It held that the FEA could regulate prices and that rents are not prices (p. 970). Neither are royalty values prices.

VALUATION OF PRODUCTION

The valuation of production for royalty purposes is clearly a matter within the Secretary's discretion. *United States v. Ohio Oil Co.*, 163 F.2d 633, 639-641 (10th Cir. 1947); *Continental Oil Co. v. United States*, 184 F.2d 802, 821 (9th Cir. 1950); *California Company v. Seaton*, 187 F.Supp. 445, 449-450, 453 (D. D.C. 1960); *California Company v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). However, even the Secretary's exercise of his authority to value production for royalty purposes is limited by court interpretation of the term "value" as meaning "true value" or "market value" of the production. In *Continental Oil Co. v. United States, supra*, the court interpreted the term "value," as it appears in the Mineral Leasing Act in the phrase "amount or value of the production" and as it is carried forward in the lease, as requiring royalty to be based upon "actual, true or market value of the oil." In *California Company v. Udall, supra*, the court stated that "value" means "fair market value."

In *California Company v. Seaton, supra*, after noting the term "value" as it appears in the phrase "in amount or value of production" is not defined in the Act and the legislative history of the Act is not helpful in defining the term, the court stated that "value" in the context in

which it appears in the Mineral Leasing Act generally means "estimated or assessed worth" or "marketable price." The court further indicated that on various occasions other courts have held that value ordinarily means market value, fair market value or market value fairly determined.

While the courts continually have upheld the Secretary's discretion to determine the value of production under the Mineral Leasing Act, the courts have gone further and established that it is reasonable for the Secretary to conclude that production generally is worth, for purposes of valuation of royalty, what the lessee is able to realize therefrom. *Continental Oil Company, supra* at 821. The Secretary, through his regulations, has established the minimum value of production for royalty purposes at no less than the gross proceeds accruing to the lessee from the sale of that production. (30 CFR 221.47 [7] onshore, 30 CFR 250.64 offshore)

Hence, the most reasonable interpretation that can be found of the meaning of the term "value" within the context of the royalty provisions of the Mineral Leasing

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[7] 30 CFR § 221.47—"Value basis for computing royalties. The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the same time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value."

Act and the OCS Lands Act is that the Secretary is obligated to value production based upon the actual, true or market value of the oil or gas produced. It is further reasonable to conclude that the actual, true or market value will be in any case no less than the gross proceeds accruing to the lessee from the sale thereof. The Secretary's regulations setting forth the Department's standards on the value basis for computing royalty (30 CFR 221.47 onshore) were found by the court in *California Company v. Seaton*, *supra* at 450, to be consistent with the Mineral Leasing Act and to be reasonable within these legal parameters. There is no indication in the Emergency Petroleum Allocation Act that the FEA Administrator has authority which permits him by regulation to release the Secretary of the Interior from this obligation.

For the phrase "in amount or value of production" to be read and interpreted in accordance with the foregoing discussion, we must conclude (1) that royalty is due on all production and that all production must be valued for royalty purposes, and (2) the value of that production must be based upon the actual, true or market value of the production and in any case no less than the gross proceeds accruing to the lessee from the sale thereof.

Although Congress delegated to the President, and thus to the FEA, the authority to regulate the price at which oil may be sold, the Secretary continues to have the authority to value oil or gas for royalty purposes. Congress has neither expressly nor impliedly granted the latter authority to the FEA. We have already established, through statutory construction, why we think the FEA's authority over price is separate from the Secretary's statutory obligations with regard to royalty. However, the FEA, in essence, appears to take the position that "value" can only be interpreted as meaning the FEA price. The FEA position assumes two things: (1) the statutory obligations established by the EPAA

override the statutory provisions of the Mineral Leasing Act and the OCS Lands Act, and (2) the regulated price equals royalty value.

The first assumption has been examined a good deal already. However, an explanation of the parallel situation with the FPC which relates to both assumptions is in order. In *Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 (D.C. Cir. 1972), *cert. denied*, 406 U.S. 976 (1972), FPC Order and Opinion No. 562, 42 FPC 164, determined and declared that the royalty provisions of oil and gas leases constitute sales of natural gas for resale in interstate commerce subject to the Natural Gas Act because the landowners contracted to retain an economic interest in interstate sales. Thus, the landowners were declared to be subject to regulation as natural gas companies whose sales are covered by the filings of their lessees, the producer-operators.

The court reversed the FPC's Opinion, finding that the lessor who has no authority to determine the incidents of sale, although he retains an economic interest, is *not a seller*. Hence, on leases which required royalty based on current "market price" of gas, the court considered the question whether an increase of royalty payments due resulting from increased value of production first has to have express prior approval of the FPC, if the price thus fixed would exceed levels prescribed by the FPC. The court ruled there was no legal impediment to producers being held on the basis of a contract to a royalty payment related to a base higher than the producer's filed rate. The court additionally found that no evidence had been presented which would lead it to believe that the federal regulatory system would be undercut by its ruling.

The situation in the *Mobil* case has its parallel in the dispute between the FEA and this Department. The 1975 amendments to the EPAA provide the President with the

authority to establish ceiling prices applicable to any first sale of crude oil produced in the United States. (Section 8(a)) The United States, as royalty owner, when it takes royalty in value does not "sell" the crude oil produced by the lessee although it retains an economic interest in the sale thereof. Thus, the "value" of the production for royalty purposes is a matter apart from the price of the production for purposes of sale.

Therefore, the FEA, like the FPC, has no jurisdiction over the valuation of production for royalty purposes. But more importantly, apart from jurisdictional disputes, the price regulation is a separate statutory function from royalty, which has its own statutory requirements. No matter who has jurisdiction, the statutory requirements must be administered as separate from one another, although complementary. The statement made by Judge Leventhal in the *Mobil* case, *supra* at 263, regarding the FPC's ruling that it had jurisdiction over royalty owners is equally applicable to this situation

> If the statutory use of "seller" or "sale" of natural gas in interstate commerce is referable to the meaning of these words in ordinary usage, or as likely understood by Congress, the FPC's ruling is clearly unsound. We do not think a different result warranted or mandated on the ground that the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies. That was indeed the objective of Congress, see *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act to activities clearly not within its terms. Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its juris-

> diction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments.

In the valuation of production for royalty purposes, the Department shares the court's view, expressed in the *Mobil* case, that the regulated price does not necessarily equal the royalty value when the latter is to be based upon current "market price." However, the Department, in acknowledgement of the fact of a regulated market, as a matter of policy and practice, generally honors the FPC prices in the case of gas, and the FEA prices in the case of oil, condensates and liquids, as the base value of the production for royalty purposes.

The starting point for computing royalties is the current posted area price bulletins that accord with FEA regulations. However, where the lessee obtains additional consideration for the sale of its product due to transportation clauses in the sales contracts or other factors, the USGS will calculate royalty on the regulated price basis, adjusted to reflect the additional value. This is because value of production is deemed to be no less than the gross proceeds accruing to the lessee from the sale thereof. *Kerr-McGee Oil Industries, Inc., et al.*, 70 I.D. 464; *Amoco Production Co.*, IBLA 77-18 (March 25, 1977). On the other hand, where the lessee has obtained an approved transportation allowance, the USGS will calculate royalty on the regulated price basis, adjusted downward to reflect the authorized transportation deduction.

Department regulations for both offshore (30 CFR 250.64) and onshore (30 CFR 221.47) state that the value, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the Supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quantity in the same field or area, to the price

received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purpose of computing royalty be deemed to be *less than the gross proceeds accruing to the lessee* from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary.

As pointed out earlier, court decisions uphold this standard for the valuation of production for royalty purposes. This standard is used for royalty calculations whether taken in amount or in value. The applicable standard for taking royalty in kind may be stated as follows: The value of royalty oil is based on the highest price that would have been legally obtainable by the lessee if royalties on production were being paid by the lessee rather than being taken in kind. (30 CFR 225.2(f) and 225a.2 (i))

The Secretary elects to take the royalty on oil production in kind as a matter of policy to make government royalty oil available to eligible or small refiners when sufficient supplies of crude oil are not available in the open market to refiners not having their own source of supply for crude oil. 30 U.S.C. § 192. "Eligible" or "small" refiners are owners of existing refineries who qualify as small business enterprises under the rules of the Small Business Administration. (30 CFR 225.2a onshore, 30 CFR 225a.2a offshore)

Pursuant to 30 U.S.C. § 192 and 43 U.S.C. § 1334, the Secretary's authority to sell royalty oil is limited to sale "at no less than the market price." "Market price" is defined by the Department's regulations, 30 CFR 225.2 onshore and 225a.2 offshore in the following way:

> (i) "Market price" means (1) the highest price per barrel regularly posted, published, or generally paid, or offered by any principal purchaser of crude oil of like quality in the field or area where produced, or

> (2) if there are no postings in the field or area, the highest price posted in the nearest field or area where crude oil of comparable quality is produced and sold, or (3) the true value as determined by the Supervisor when in his judgment such highest price regularly posted, published, or generally paid or offered in the same field or area or the nearest field or area is found by him to be less than the true value of the royalty oil. *In no event shall the "market price" be less than the estimated reasonable value which the Supervisor would determine as the value of production, pursuant to § 250.64 of this chapter, if royalties on the production in question were being paid in money by the lessee rather than being paid or taken in kind.* (30 CFR 250a.2) (emphasis added)

Clearly, in the regulated market, the "highest price per barrel regularly posted" is generally the posted price as limited by the FEA. The USGS, in valuing royalty oil, honors the FEA price. The royalty oil is sold at the FEA price. However, the amount the refiner may owe the United States under the royalty oil contract may in some instances exceed or be less than the FEA price due to adjustments for transportation costs.

These adjustments are based upon the view that the United States should receive the same royalty value whether the royalty on production is taken in kind or in value. If the value of production for royalty purposes is one thing for the lessee when he sells it, then the value for the United States when it sells the oil should be the same. The United States should receive no less than the lessee would receive when selling the same product.

BILLING ADJUSTMENTS

FEA regulations, in essence, require the certification to the purchaser of the volume and regulated type of crude oil and a statement that the price charged for the oil is

no greater than the maximum price permitted pursuant to FEA regulations (10 CFR 212.131). The certification for new crude oil is to be provided within "the consecutive two-month period immediately succeeding the month in which the crude oil is produced and sold . . . ." (10 CFR 212.72). After such time, FEA regulations do not permit upward adjustments to billings to the refiner-purchaser of royalty oil. However, the FEA regulations do not limit the time within which refunds due to overbillings may be made. We do not believe the Secretary may abide by FEA regulations regarding certification (10 CFR 212.313 and 212.72) where such regulations circumscribe the Secretary's duty to collect royalty in accordance with the Mineral Leasing Act of 1920 and the OCS Lands Act.

When the Secretary elects to take the United States' royalty on oil production in kind, the following reporting and accounting procedures are observed with respect to the sale. For our purposes here, we will trace the reporting and accounting procedures as they would occur for the sale of royalty oil produced offshore, taking June as the production month for our example. Onshore procedural differences are noted where appropriate. We will also assume that a small refiner has entered into a standard three year royalty oil contract with the United States.

Throughout the production month of June, the lessee, having received notice from the Supervisor, delivers a portion of that production to the refiner at the previously agreed upon delivery point. Although the Supervisor determines in advance that the refiner is entitled to fixed amounts of royalty oil for that month, the actual volume of oil delivered to the refiner that month may be less or greater than the entitlement.

The lessee is required by regulation (30 CFR 221.62, onshore and 250.94 offshore) to submit a Monthly Report

of Sales and Royalty, Form 9-153 (Form 9-361 onshore), for each month of production. The offshore report is due by the last day of the first month following the month of sales (July 31). Onshore, the report is due on or before the tenth day of the second month following the month of sales (August 10). The time for submission of these reports is the earliest practicable time by which a lessee can account for monthly production. On this form the lessee reports on a lease basis the volume of production and the disposition of that production for the month. The volume of oil sold and the prices at which the oil was sold are indicated. Offshore, when royalty is taken in kind, the lessee indicates the value of the monthly production. This value is based upon the posted price in the field as limited by the FEA and adjustments for transportation as provided for in Department regulations. This reported royalty value assume. that the refiner actually received the exact monthly entitlement of royalty oil.

Sometimes, the lessee does not report accurate figures. This may occur for several reasons. If the lessee's lease is committed to a Unit, his data showing the amount of production allocated to his lease may be incorrect. Onshore, the lessee may have made an incorrect well count when calculating production subject to royalty. Sometimes, the lessee is uncertain about the applicable FEA price. Calculation errors are also possible.

By Department regulation, the refiner is required to have some form of bond coverage for the royalty oil purchases. The usual bond coverage is for 90 days, although these bonds may also be executed for 30 or 60 days. For purposes of our example, we will assume 90-day bond coverage.

The United States Geological Survey (USGS) sends the refiner an "estimated billing" for the June production month no later than the 15th day following the last day of the month of production, July 15. This billing is

based upon historical take calculated from the figures submitted by the lessee in his Report on Sales and Royalty for the previous month's production (May or April). The amount billed is payable within 30 days from the end of the production month, i.e. by July 31. In light of the bond coverage or posted surety, this estimated billing is timed to protect the interests of the United States in guaranteed payment for its royalty oil. By August 15, another estimated billing will have gone to the refiner containing a billing for July production.

In the meantime, the June Report of Sales and Royalty has been reviewed for completeness by the USGS Area Accounting Section, typed for automatic data processing, and forwarded to the USGS at Reston, Virginia for entry into the lease account. A computerized Statement of Account, Form 9-1424, is then mailed to the Area Office about 60 days after the production month, i.e. August 30. The Statement of Account shows the volume and disposition of oil produced for the production month. It indicates the volume sold and the net value. The net value is based upon the FEA price at which the oil was sold, adjusted for transportation costs. The net value is the value reported by the lessee and should be, in any case, no less than and no more than the estimated reasonable value which the Supervisor would determine as the value of production if royalties on the production in question were being paid by the lessee rather than being taken in kind. The Statement of Account is used offshore as the final corrected billing for the June production and is sent by USGS to the refiner. The Statement of Account for the lessee additionally reflects the total volume and value of the royalty oil that was taken in kind by the refiner.

Onshore, the Statement of Account is further adjusted by the Area Accountants to reflect corrections reported after the data had gone into the computer. Thus, onshore, the USGS sends the refiner and the lessee what is

called the "Actual Letter" which is considered as the final corrected billing. This letter goes out to the refiner usually 15-20 days after the Area Office's receipt of the Statement of Account, i.e. September 15-20.

Accompanying the Actual Letter is a standard form entitled "Report on Upper Tier and Lower Tier Oil." This report is the most accurate statement available to the USGS of the volumes of upper tier and lower tier oil delivered during the production month and the FEA weighted average prices for that oil. It also states the values of the oil for royalty purposes. This report has been used by the USGS since May 15, 1975 onshore and was orally found acceptable by the FEA to be used in place of the certification required by FEA regulations (10 CFR 212.131). Although the offshore supervisors were instructed to use this form, we have discovered that the form has not been used offshore. The USGS has recently reinstructed the offshore supervisors to use the form and it will shortly be sent out in conjunction with the Statements of Account to the refiners.

The report is not a certification of the amount and value of the oil delivered during the production month. This is because the USGS never has physical control over the oil at any time during the royalty oil sale transaction. The USGS report is based upon information, of necessity, supplied by the lessee in its Monthly Report of Sales and Royalty submitted 30-40 days after the production month. The report (on upper tier and lower tier oil) is only as accurate as the lessee's figures upon which it is essentially based. These figures reflecting volumes, sale prices, and royalty values of production, are subject to and frequently are corrected by the lessee or by the USGS pursuant to an audit months after delivery of the royalty oil. The Secretary cannot certify in good faith that these are the correct figures; rather, he can only report the best figures he has at the time. This is also why the USGS cannot comply with FEA regulations es-

tablishing the 60-day period from the month of production as the date beyond which the Secretary may not collect additional royalty due the United States.

Legally, we think the Secretary may not be lawfully bound by the 60-day requirement or the certification requirement. The Secretary's statutory duty to collect royalty on all production and to sell royalty taken in kind at no less than the market price may not be circumscribed by regulations which, through time constraints or certification, prevent him from obtaining the "market price" on an accurately determined volume of production. His authority to collect the proper royalty due the United States may be circumscribed only by statute. In this regard, he is limited in his time for collection of proper royalties by the statute of limitations. (Federal Claims Collection Act of 1966, 31 U.S.C. § 951-953). (*See, Continental Oil Company v. United States, supra*, to the effect that the Secretary may collect back royalties where royalty had been paid on a basis of less than the true value.) He may not be limited further by the FEA unless specific statutory authority can be found to modify the Mineral Leasing Act and OCS Lands Act by authorizing the FEA to regulate the collection of royalty due the United States. Such authority is clearly lacking. (Although in *California v. Simon*, 504 F.2d 430 (TECA 1974) the court considered the procedural basis for FEA's rescission of state and local government exemption from FEA price controls for oil produced on state and locally owned land, which also removed the Federal Government exemption, the substantive merits were not considered.)

Even if the FEA had the authority, the FEA regulations in this regard are clearly unreasonable and arbitrary as to the United States. For example, while the Secretary may not bill refiners for higher royalty based on corrected accounts after the 60-day period, he evidently may refund or credit overpayments made by refiners

at any time. It should be noted that the USGS regularly grants refunds or credits to the refiner where adjustment of accounts 60 days after the production month indicates overpayment due to overbilling.

Clearly, this regulatory scheme works against the interest of the United States as a matter of policy. It also is arbitrary in that it gives less latitude for collection of royalty due to underbilling than to refunds due to overbilling. Perhaps this constraint makes sense for producers who sell their own oil directly to a refinery or pipeline. These producers have more opportunity for control of data and producing operations. However, the United States must rely upon reporting by its lessees while its lessees control actual production and delivery. Hence, the 60-day requirement constrains the party least able to control factors which are essential to achieve compliance.

If the Secretary honored the 60-day restriction and the certification, the United States would lose millions of dollars in royalty revenue each year. The result would probably lead the Secretary to conclude as a matter of policy that it is no longer in the interest of the United States to take royalty on oil production in kind. The Secretary would cease selling royalty oil to eligible refiners. The only other alternative would be for the Secretary to increase the estimated billings to refiners by a fairly large percentage to insure there would never be any underpayments by refiners. The Secretary would then be able to make appropriate refunds or credits.

ADMINISTRATIVE CHARGE

FEA contests the authority of the Secretary to charge the refiner for the cost of administration of the royalty oil sale of an amount equal to one-half percent of the market price for each barrel of royalty oil sold. (30 CFR 225.3 onshore and 225a.3 offshore). The Secretary's

authority for charging the refiner has been based upon 31 U.S.C. § 483a. That section provides that a federal agency head may by regulation prescribe a fee, taking into consideration the direct and indirect cost to the government, the value to the recipient, public policy or interest saved, for any work performed or benefit granted by the federal agency. The Secretary's regulations providing for the charge to the refiner are based upon the fact that the entirely separate, complex system required for accounting for royalty oil sales is an additional burden to the government not otherwise incurred when royalty is taken in value. Also, the royalty oil sales are currently designed to meet the need of small refiners for supplies of crude oil which such refiners cannot obtain any other way. Thus, the charge also takes into consideration the value of the benefit received by the refiner.

Since the Federal Land Policy and Management Act (FLPMA) became law on October 21, 1976 (90 Stat. 2743), the Secretary is specifically authorized under Section 304 to establish reasonable charges with respect to applications and other documents relating to the public lands to reimburse the United States for reasonable costs incurred. The Secretary is instructed by this law to take into consideration factors similar to those mentioned in 31 U.S.C. § 483a. We think the Secretary has clear statutory authority to assess the refiner for administrative costs, and we think his exercise of this authority is reasonable under the circumstances.

However, since the collection of an administrative charge is not required by statute, the Secretary is in a position to accommodate FEA by dropping the charge. Perhaps this matter would best be resolved by the Office of Management and Budget.

TRANSFER OF FUNCTIONS

It is appropriate to note here that Section 302(b) of the Department of Energy Organization Act (91 Stat. 565) transfers certain royalty functions of the Secretary of the Interior to the Secretary of the Department of Energy. Section 302(b)(5) provides:

> (b) There are hereby transferred to, and vested in, the Secretary the functions of the Secretary of the Interior to prescribe regulations under the Outer Continental Shelf Lands Act, the Mineral Lands Leasing Act, the Mineral Leasing Act for Acquired Lands . . . which relate to the . . .
>
> (5) specifying the procedure, terms, and conditions for the acquisition and disposition of Federal royalty interests taken in kind.

It is not clear from this language whether the Secretary of Energy may prescribe regulations dealing with the valuation of royalty oil, since the statute speaks of prescribing "procedures, terms and conditions" for its "acquisition and disposition." It seems clear that the quoted language relates to the eligibility of refiners to obtain federal royalty oil and the system by which such royalty oil is allocated among eligible refiners. If the new Secretary's authority also includes the power to prescribe royalty oil contract terms, valuation of royalty oil may be included as a part of that function.

In any case, the valuation for royalty purposes of oil taken in kind and the accounting procedures by which the proper royalty is collected must continue to be performed in accordance with the statutes pursuant to which these functions are authorized.

With this regard, the Secretary of Energy, by the transfer of authority, inherits the same statutory obligations the Secretary of the Interior has under the Mineral Leasing Act and the OCS Lands Act. The fact that the same

Secretary will have authority over both prices for the sale of crude oil and perhaps also valuation of royalty oil, including accounting procedures, does not mean that the two functions lose the separate statutory constraints which arise out of their separate statutory origins, however interrelated the two functions may be.

Therefore, the views we have expressed in this opinion are not altered by the transfer of functions pursuant to the Department of Energy Organization Act. We believe any new regulations devised by the Secretary of Energy should reflect cognizance of the statutory constraints and obligations we have discussed in this opinion.

We are aware that the Secretary of Energy may be placed in a conflicting policy role by the transfer of functions under Section 302(b)(5); however, we believe that conflicts can be minimized through cooperation between those in this Department charged with administration of royalty matters, the Conservation Division of the U.S. Geological Survey, and those charged with regulation authority in the Department of Energy.

LEO M. KRULITZ

Solicitor

May 2, 1978

MEMORANDUM FOR: Robert Walter
Director, Leasing Program Office
Peggy Halpern
Litigation Division
Office of General Counsel

FROM: Bryan Perilman
Compliance Division
Office of General Counsel

SUBJECT: Proposed Draft NOPV to USGS

Pursuant to our meeting today, please find attached a rough draft copy of a proposed NOPV which ERA is considering issuing to USGS. The draft has not been modified as yet to incorporate the new procedural requirements under the PRO system (10 C.F.R. 205.150 *et seq.*).

Please note also that the draft has not yet been officially accepted by ERA and is subject to further modification. Any suggestions you have, of course, are welcome.

Feel free to call me if you have any questions regarding this draft. I am enclosing several copies for you to distribute to those at the meeting who work in or with your offices.

Attachment

OGC:BPerilman:bld:Rm.5388:2000":x43700:2May78

[SEAL]

Oct. 1, 1979

Department of Energy
Washington, D.C. 20461

MEMORANDUM FOR BARTON ISENBERG
Assistant Administrator for
Enforcement
Economic Regulatory Administration

FROM: Robert D. Gerring
Director for Program Operations
Office of Enforcement

SUBJECT: U.S. Geological Survey

A great deal of rhetoric has transpired regarding whether the crude producer regulations should be enforced with regards to sales by the U.S. Geological Survey.

On the surface, it is a case of whether or not the Department of Energy (DOE) should extract refunds from another goverment agency when, ultimately, at least a portion of the refunds may remain in a government account. The situation is more serious and complex than the above statement. The specific question is this: "Is the U.S. Geological Survey exempt from duly authorized laws, whereby it can sell its crude oil at any price it desires, or must it abide by the regulations as set forth by other Federal agencies?"

According to information supplied by L.K. Jones, the Survey does not operate any of its own leases. Rather, it receives royalties in kind from the lease operators, which it sells on its own accord. As the crude oil is produced from Federally-owned land, no other royalties are paid. In the past, it has been alleged that crude oil has been sold in excess of maximum legal ceiling prices.

Furthermore, in most cases, it has refused to provide certifications concerning the correct tier of oil it is sell-

ing. The policy of challenging the Department of Energy's authority to regulate energy by governments, i.e. Federal, State, and city, is becoming more prevalent. Recently, the States of Wyoming and Louisiana have questioned the authority of the supplier/purchaser rule and have directed that oil produced in those States will remain in those States. In addition, relationships have been terminated unilaterally.

It is my belief that we should meet with the U.S. Geological Survey to discuss all aspects of the case and propose that compliance with the regulations on a current basis take place. If we do not receive cooperation from the Survey, we should take appropriate action to recover overcharges and establish compliance with current regulations.

Tom Holleran, Wayne Tucker, and myself are available to discuss the matter with you.

cc: W Tucker
T Holleran

HAND DELIVERED

Department of Energy
Washington, D.C. 20461

October 25, 1979

Mr. Kenneth Lee
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C.

Dear Mr. Lee:

Attached is a brief summary of six enforcement issues involving practices of the U.S. Geological Survey. It is requested that you review these issues, and let Mr. William Pendergrass of my staff know if you would like to meet with him on Friday morning, October 26, at 10:00 a.m., to discuss these issues in advance of a meeting between members of the Office of the Solicitor and the Office of the General Counsel. You may reach Mr. Pendergrass at (202) 254-8700.

Sincerely,

Robert G. Heiss
Assistant General Counsel
for Enforcement

Attachment

cc: John Leshy
Larry McBride

BRIEF SUMMARY OF SIX ENFORCEMENT ISSUES INVOLVING PRACTICES OF USGS

USGS sales of royalty oil without certification of volumes of upper and lower tiers of crude oil

10 CFR § 212.131 requires, *inter alia*, that the producer certify in domestic crude oil sales, the volumes of lower-tier ("old") crude oil and upper-tier ("new") crude oil. USGS apparently billed one purchaser of royalty oil for crude oil sold in the first four months of 1975, without certifying any volumes of upper-tier oil. The lower-tier price was approximately $5.35 during that period, but USGS billings appear to have exceeded the lower-tier price by approximately $450,000, exclusive of interest.

USGS sales of royalty oil without regard to the property's BPCL

With regard to an offshore lease, USGS apparently sold royalty oil at exempt prices prior to February 1, 1976, and at upper-tier prices subsequently, without regard to BPCL, in violation of 10 CFR § 212.73. USGS apparently computed the selling price of royalty oil using a "ratio" method for the month of production, as follows:

$$\text{Selling Price per barrel} = \frac{\text{Gross proceeds from all production accruing to lessee(s)}}{\text{All production from lease (barrels)}}$$

USGS sales of royalty oil based upon recertifications of crude oil outside the two-month period required by 10 CFR 212.72 and 212.131

10 CFR § 212.73(a) limits a producer's pricing of a "first sale" to the lower-tier ceiling price except for "new" crude oil (defined in § 212.74). Furthermore, 10 CFR § 212.72 (and § 212.131) provides that new crude

oil shall not include oil that is not certified as new crude oil within the consecutive two-month period immediately succeeding the month in which the crude oil is produced and sold. USGS allegedly charged a price to a purchaser of royalty oil, Young Refining Corp., based upon volumes of crude oil that had not been certified or recertified as "new" or "upper-tier" crude oil within the two-month period required by 10 CFR §§ 212.72 and 212.131, resulting in an overcharge of $127,819.25, exclusive of interest, for sales applicable to the months of September and October 1976. In addition, another purchaser has identified $71,220.04 in alleged overcharges that have resulted from untimely recertifications of crude oil by USGS in June 1975 and January and February 1977.

USGS sales of royalty oil at "stripper well" prices based upon inclusion of injection wells in the number of wells used to determine average daily production

USGS has apparently sold royalty oil at "stripper well" prices by determining average daily production based upon the inclusion of injection wells, in violation of 10 CFR § 212.54, as interpreted by Ruling 1974-29 and DOE's Notice of Enforcement of 10 CFR § 212.54 as Interpreted by Ruling 1974-29 (March 23, 1978). DOE has excluded injection wells from the determination of a property's average daily production, since those wells are not considered as wells which "produce" crude petroleum. One purchaser has alleged that the USGS overcharge for one month, August 1979, for sales of royalty oil at "stripper well" prices based upon inclusion of injection wells in determining average daily production, was $1,112,500.

USGS sales of condensate produced from gas wells as "stripper well" exempt crude oil

As stated in Ruling 1974-28, a firm may not properly claim "stripper well" exempt status for the natural gas

or condensate production of "gas wells" on a property, since these wells do not produce crude petroleum. See 10 C.F.R. § 210.32, now deleted. Investigation of an offshore property disclosed that gas wells which produced condensate were improperly classified as "stripper wells", and, as a result, USGS charged uncontrolled prices for the royalty oil produced and sold from the property, in alleged violation of 10 CFR § 212.73.

USGS' failure to maintain records

Economic Regulatory Administration auditors have noted that USGS records are apparently, in several areas, not maintained in accordance with the requirements set forth in 10 CFR § 212.128(a) and (c). Specifically, it appears that USGS has failed to: compute each property's base production control level, document the highest posted prices used to determine sales of upper-tier and lower-tier crude oil from each property, produce records, on a well-by-well basis, of production from stripper well properties.

In Reply Refer To:

EGS-MS640

24 May

Memorandum

To: Associate Solicitor—Energy and Resources

From: Deputy Division Chief, Offshore Minerals Regulation Conservation Division

Subject: Request for a refund of $17,359,883.88 by Lakeon Asphalt Refining, Inc., in connection with royalty oil sales by the USGS

In a memorandum dated October 21, 1977, the Solicitor took the position that, in connection with royalty oil sales, the USGS was not required to comply with certification and pricing regulations issued by the Department of Energy. On at least one occasion the Department of Justice suggested that our position was not legally defensible.

Under the circumstances, please let us know whether we should defer to the view of the Department of Justice in this matter.

ROBERT L. RIOUX

cc: CD/FORP/640
DDC/Offshore
Desk File (Eva Datz)
BORP Chrons
OFF/MR Chrons

CD:EDatz:css:3/23/81:860-7395 Disk SS#1

DRAFT

Memorandum

To: Assistant Solicitor, Offshore Minerals and International Law

From: John H. Kelly, Staff Attorney

Subject: Solicitor's Memorandum of October 21, 1977

This responds to your request for a review of the above memorandum to determine if it is legally supportable. A copy of the memorandum is attached for your reference.

Two of the three conflicts between DOE and DOI discussed in the memorandum have been resolved by DOE regulations. Effective March 13, 1980, DOE provided in 10 C.F.R. § 212.74(d) that OCS royalty oil could be sold for a price that exceeded the ceiling price by one-half percent. Survey was thereby authorized to assess its one-half percent administrative charge on OCS royalty oil. Further, DOE had earlier proposed regulations (10 C.F.R. § 391.210(a)(2), 44 *Fed. Reg.* 45,900, 45,908 (August 3, 1979)), that would allow an administration charge of one-half percent for onshore royalty oil sales but these regulations were not published in final form due to uncertainty regarding the effects of the decision in *Plateau Inc. v. Department of the Interior*, 603 F.2d 161 (10th Cir. 1979) on standards to be used in the sale of onshore royalty oil. Also effective March 13, 1980, DOE provided in 10 C.F.R. § 212.74(e) that in those cases where price relief is granted a producer, the royalty owner is entitled to the same relief. This regulation allowed Survey to base its royalty rate on the actual price received by the producer, not on the regulated price, and represented a reversal of DOE's position in *M. J. Mitchell*, 3 FEA Par. 83, 146 (April 2, 1976). As indicated above, the conclusions reached by the memoran-

dum regarding the issues of the administrative charge and price relief are no longer in conflict with those of DOE. Such conclusions are legally supportable and have been affirmed by DOE's regulations.

The third conflict between DOE and DOI discussed in the memorandum is DOI compliance with DOE regulations regarding certification. The memorandum concludes that DOI is not required to comply with these regulations for the reason that they circumscribe the Secretary's duty to collect royalty in accordance with the Mineral Leasing Act of 1920 and the OCS Lands Act. These regulations require that certification of new crude oil is to be provided within 60 days after the month in which the oil is sold. 10 C.F.R. § 212.72(d); 10 C.F.R. § 212.131(a). They also prohibit charging retroactive price increases after the period of certification (10 C.F.R. § 212.74(c)) and are applicable to sales of oil by "any Federal department, agency, or other instrumentality . . . ." 10 C.F.R. § 212.52. The memorandum does not assert that the certification regulations are not authorized by statute. The position taken by the memorandum appears to be that while the regulations are authorized, they cannot legally be applied to the Survey because Survey cannot comply with them without losing royalty revenue. The memorandum contains several statements of law and fact which deserve attention. First, it is stated at page 18:

> We do not believe the Secretary may abide by FEA [DOE] regulations regarding certification (10 C.F.R. § 212.313 [sic] and 212.72) where such regulations circumscribe the Secretary's duty to collect royalty in accordance with the Mineral Leasing Act of 1920 and the OCS Lands Act.

The basic problem posed by the above statement is whether the regulations actually "circumscribe the Secretary's duty to collect royalty." The memorandum

Supreme Court, U.S.
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CLERK

No. 85-504 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

---

BRIEF FOR AMICUS CURIAE LAKETON ASPHALT REFINING, INC.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

22

QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals, in disregard of this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), could bar a citizen's suit for return of money that the Department of the Interior has unlawfully exacted, on the grounds that the United States has not waived sovereign immunity for such suit.

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IN THE

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No. 85-504

LUNDAY-THAGARD COMPANY,

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UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

---

BRIEF FOR AMICUS CURIAE LAKETON ASPHALT REFINING, INC.

INTEREST OF AMICUS CURIAE

Laketon Asphalt Refining, Inc. ("Laketon"), as amicus curiae, hereby files its brief in support of the Petition for a Writ of Certiorari filed by Lunday-Thagard Company ("Lunday-Thagard" or "Petitioner"). Lunday-Thagard has brought an action, as have many other small crude oil refiners, including Laketon,[1] to recover massive crude oil

---

[1] *See* Laketon Asphalt Refining, Inc. v. United States Department of the Interior, No. EV-81-162-C (S.D. Ind. filed Aug. 7, 1981).

overcharges that the Department of the Interior ("DOI") exacted and retained in willful, knowing violation of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 753 (1982), and of the Mandatory Petroleum Price Regulations ("Price Regulations"), 10 C.F.R. Part 212, that were administered by the Department of Energy ("DOE") and its predecessor agencies, under the authority of the EPAA.[2] By judgment entered on July 26, 1985, the Temporary Emergency Court of Appeals ("TECA") held that Lunday-Thagard was barred by the doctrine of sovereign immunity from seeking redress for such knowing and willful violations. *Lunday-Thagard Co. v. United States Department of the Interior*, No. 5-115 (Temp. Emer. Ct. App. July 16, 1985), *reprinted in* Petitioner's Appendix A at 1a ("Pet. App.").[3]

Laketon's similar pending action is in danger of being dismissed unless the *Lunday-Thagard* decision is reversed. Indeed, on August 16, 1985, the DOI filed a Motion To Stay consideration of Laketon's Motion for Partial Summary Judgment pending the court's resolution of the DOI's Motion To Dismiss, citing TECA's decision in Lunday-Thagard in support of its contention that Laketon's claims are barred by sovereign immunity. *See* Defendants' Motion To Stay, Appendix to Brief for Amicus Curiae Laketon Asphalt Refining, Inc.

Lunday-Thagard has petitioned this Court to review TECA's July 26, 1985 judgment. Laketon supports Lunday--

[2]All references in this Brief to the Department of Energy should be understood to include its predecessor agencies, the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration ("FEA").

[3]Statutory suits for redress, as opposed to common law suits for the refund of unlawful overcharges, are authorized under Section 210 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note (1976).

Thagard's petition and respectfully requests that a writ of certiorari be issued.

SUMMARY OF ARGUMENT

TECA's ruling that Lunday-Thagard's action is barred is contrary to law and is inconsistent with decisions of this Court. The Tucker Act waives sovereign immunity for Lunday-Thagard's common law cause of action for refund of money unlawfully exacted. In addition, Lunday-Thagard has separate and distinct statutory causes of action against the government for violations of the crude oil pricing regulations.

ARGUMENT

Without discussing the voluminous documentary evidence that DOI knowingly and willfully violated DOE's crude oil price and certification regulation and thus wrongfully exacted money from purchasers of crude oil from DOI,[4]

[4]A few of the relevant documents obtained pursuant to requests under the Freedom of Information Act have been compiled in the Appendix filed in connection with the Brief for Amici Curiae Howell Corporation, *et al.* In addition, two of the documents which appear in the Howell Appendix were obtained through discovery and marked as trial exhibits in Plateau, Inc. v. United States Dep't of Interior, No. 82-0501 (D. Wyo.) (dismissed upon settlement May 30, 1984). *Plateau*, as well as a number of other overcharge cases, were settled by the DOI prior to trial, generally after denial of the DOI's Motion To Dismiss on sovereign immunity grounds. *See, e.g*, Young Refining Corp. v. United States Dep't of Interior, No. 82-2048 (E.D. La.) (dismissed upon settlement Aug. 2, 1983); Wyoming Refining Co. v. Dep't of Interior, No. C81-0376B (D. Wyo.) (dismissed upon settlement Nov. 13, 1982); Sabre Refining Co. v. Andrus, No. H-80-59 (S.D. Tex.)(dismissed upon settlement Jan. 8, 1981); Young Refining Corp. v. United States Dep't of Interior, No. 78-1470 (D.D.C.)(dismissed upon settlement Dec. 12, 1978); *see also* Glenrock Refinery, Inc. v. United States Dep't of Interior, No. C84-0264B (D. Wyo. Dec. 5, 1984). For a thorough discussion of the history of DOI's disregard of the federal petroleum price controls, see Brief for Amici Curiae Howell Corporation, *et al.* at 8-13.

TECA ruled that redress for DOI's violations could not be sought because the United States did not waive sovereign immunity for actions under Section 210 of the ESA. At the same time, however, TECA acknowledged that

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to Congress for relief.

Lunday-Thagard, slip op. at 8, *reprinted in* Pet. App. at 8a.

TECA's ruling that Lunday-Thagard's action is barred ignores both the common law and recent decisions of this Court. The United States has waived sovereign immunity from this action not once, which is all that is required, but at least three times.

I. TECA Erroneously Held That The United States Did Not Waive Sovereign Immunity For Lunday-Thagard's Common Law Action To Recover Money Wrongfully Exacted And Retained By The DOI.

A. Lunday-Thagard has a common law cause of action for return of money the DOI wrongfully exacted, for which sovereign immunity has been waived.

Lunday-Thagard's cause of action is grounded upon the common law right to recover money wrongfully exacted or retained. *See Bank of the United States v. Bank of Washington*, 30 U.S. (6 Pet.) 8 (1832). This Court described this right of action as follows:

> Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it.

Id. at 19. Claims for refund of money wrongfully exacted are actionable against the United States government by operation of the waiver of federal sovereign immunity set forth in

the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1982), which provides for a right of action against the sovereign as to

> any claim against the United States founded either upon *the Constitution* or *any act of Congress* or *any regulation of an executive department* or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. § 1491 (emphasis added); *see also id.* § 1346(a)(2). The applicability of that waiver of immunity to the common law cause of action for unlawful exaction has been consistently and emphatically confirmed by this and other courts. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Testan*, 424 U.S. 392, 402 (1976); *Carriso, Inc. v. United States*, 106 F.2d 707, 712 (9th Cir. 1939); *Eastport S.S. Corp v. United States*, 372 F.2d 1002 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Eastport S.S. Corp. v. United States*, 157 Ct. Cl. 802, 804 (1962); *Seatrade Corp. v. United States*, 285 F.2d 448 (Ct. Cl. 1961); *Clapp v. United States*, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954).

In the most recent of these decisions, *United States v. Mitchell* ("*Mitchell II*"), this Court specifically noted that the government had not even bothered to contest the plaintiffs' right to sue for the refund of excessive or improper exactions. The Court quoted the Court of Claims' conclusion that "there is undoubted consent-to-suit from such claims that the government illegally kept some of the [plaintiffs'] own money or property". 463 U.S. at 222 n.23.[5] This holding

[5]In its decision TECA held that, because the ESA places jurisdiction of EPAA claims in the District Courts and not in the Court of Claims, Lunday-Thagard's claim does not fall within the Tucker Act.

is consistent with this Court's decision in its first consideration of *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535 (1980), in which the Court recognized that even without an explicit statutory waiver of sovereign immunity for money damages, an action still could be "cognizable under the Tucker Act because it involves money improperly exacted or retained." *Id.* at 546 n.7.

Mitchell II thus confirms the conclusion set forth in *Eastport Steamship Corporation v. United States* and emphasized in *United States v. Testan* that sovereign immunity from claims such as the instant one for the return of money paid to the government is categorically waived by the Tucker Act, regardless of whether the claimant also asserts a separate statutory cause of action. *See Eastport S.S. Corp.*, 372 F.2d at 1007 (expressly distinguishing between actions for return of money wrongfully exacted that citizens have already paid to government and damage actions seeking compensation where no money has been paid); *Testan*, 424 U.S. at 402 (same,; *see also Neely v. United States*, 554 F.2d 114 (3d Cir. 1977); *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979); *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971).

When a refund is sought, rather than damages, however, it is insignificant which particular statute has been violated by the government. The important fact, for purposes of the waiver of sovereign immunity, is that the overcharge was illegal at the time it was received. Likewise, as demonstrated by both *Mitchell I* and *II*, it is irrelevant whether the particular statutory scheme violated also contains a separate damage remedy and waiver: the common law cause of action for refund exists independent of any separate damage remedy or waiver. *See Mitchell II*, 463 U.S. at 222 n.23 (quoting Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983)).

Lunday-Thagard, like Laketon, has claimed, and if given the opportunity, will prove, that the government exacted overcharges in sales of crude oil to a small refiner in violation of the EPAA and Price Regulations. Nothing more is required.

B. Lunday-Thagard need not identify an additional statutory waiver of immunity.

Although TECA considered it significant that no express waiver of sovereign immunity is contained in Section 210 of the ESA, *Lunday-Thagard*, slip op. at 4, *reprinted in* Pet. App. at 4a, in fact Lunday-Thagard needs no such waiver. Although both Section 210 of the ESA and Section 23 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1982), do, in fact, create statutory causes of action against the DOI in suits such as Lunday-Thagard's, the existence or nonexistence of a waiver of sovereign immunity in those statutes is totally irrelevant to Lunday-Thagard's common law cause of action for illegal exaction and retention of money by virtue of its violations of the EPAA and Price Regulations. This cause of action constitutes a claim "founded on an act of Congress" (the EPAA) or "regulation of an executive department" (the DOE Price Regulations) for which the Tucker Act waives governmental immunity.[6] It represents a classic example of the situation

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[6]The limitation statute applicable to actions against the government under the Tucker Act waiver of sovereign immunity is 28 U.S.C. § 2401(a). Section 2401(a) is a revision of the prior Tucker Act limitation provision adopted by Congress in 1948. 62 Stat. 971; *see* United States v. Glenn, 231 F.2d 884, 886 (9th Cir. 1956). By separately placing and repromulgating § 2401(a), Congress emphasized that this general limitations statute is intended to be applicable to "*every civil action*" against the United States unless Congress, in a separate federal statute governing a specific type of action, has

described in *Eastport Steamship Corporation* and denounced by the court in *Clapp v. United States* in which "the Government has the citizen's money in its pocket, and pleads the illegal acts of its officials as an excuse for keeping it there." *Eastport S.S. Corp.*, 372 F.2d at 1008; *Clapp*, 117 F. Supp. at 580.

To require Lunday-Thagard to identify an additional waiver of immunity for its improper exaction claim besides that contained in the Tucker Act would be in direct conflict with the express holdings of *Mitchell II* and the numerous other cases that address the issue of the independence of the Tucker Act waiver of immunity for wrongful exaction claims against the government. *See, e.g., Mitchell II*, 463 U.S. 206; *Testan*, 424 U.S. 643; *Neely*, 554 F.2d 114; *Aycock-Lindsay Corp. v. United States*, 171 F.2d 518, 520-21 (5th Cir. 1948); *Eastport S.S. Corp.*, 372 F.2d 1002; *South Puerto Rico Sugar Co. Trading Corp.*, 334 F.2d 622; *Suwanee S.S. Co. v. United States*, 279 F.2d 874 (Ct. Cl. 1960); *see also Davis*, 490 F.2d 1360; *Sanders*, 594 F.2d 804; *Chambers*, 451 F.2d 1045.

II. In Addition To Its Common Law Cause of Action, Lunday-Thagard Has Separate And Distinct Statutory Causes Of Action That Fairly Mandate Compensation Against The Government For Injuries Caused By Its Violation Of Crude Oil Pricing Regulations.

In enacting the EPAA, Congress incorporated Sections 210 and 211 of the ESA. *See* 15 U.S.C. § 754 (1982); 12

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explicitly designated a shorter or longer limitations period. *See* Menkarell v. Bureau of Narcotics, 463 F.2d 88, 91 (3rd Cir. 1972); Eastern Freight Ways, Inc. v. United States, 257 F.2d 703, 705 (2d Cir. 1958); Carriso, Inc. v. United States, 106 F.2d 707 (9th Cir. 1939); *see also* Poindexter v. United States, 647 F.2d 34, 37 (9th Cir. 1981) (by federal statute of limitations, Congress decided to allow suits against United States that might be barred against private defendant by shorter state limitations period, and to cut off suits that might be allowed against private defendant by longer state limitations period); Young v. United States, 184 F.2d 587 (D.C. Cir. 1950).

U.S.C. § 1904 note (1976). Section 210 of the ESA creates a federal cause of action for "any person suffering a legal wrong because of any act or practice arising out of [the Price Regulations]." Such a suit may be brought without regard to the amount in controversy, and may request compensatory, declaratory or injunctive relief.[7]

This Court's decision in *Mitchell II* holds that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear." 463 U.S. at 218. Lunday-Thagard, which suffered a legal wrong from the DOI's violation of the Price Regulations, thus has a substantive right to recovery for which the existence of a waiver of sovereign immunity is clear. That such relief is made equally available when the illegal "act or practice" was committed by a government agency is obvious from the statutory framework and legislative history of the Act.

The language of Section 210 is properly interpreted to mandate compensation against the United States in Lunday- Thagard's action because the EPAA and its implementing regulations expressly apply to sales of crude oil by all

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[7]Congress also provided a right of action for aggrieved purchasers of off-shore royalty oil from the DOI in the 1978 Amendment to the OCSLA. In § 27 of the Act Congress authorized the DOI to sell such royalty oil "for not more than its regulated price . . .". 43 U.S.C. § 1353(b)(1) (1982). In § 23 Congress ensured that "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States . . . for any alleged violation of any provision of this subchapter . . .". *Id.* § 1349(a)(1). Further, the Act states "[n]othing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief." *Id.* § 1349 (a)(6).

sellers, including federal, state and local governments. *See* EPAA §§ 4(a) ("regulation *shall apply to all crude oil* . . . produced in or imported into the United States"), 5 (ESA § 210 *"shall apply to the regulation promulgated under section 753(a)"*), 15 U.S.C. §§ 753(a), 754(a)(1) (1982) (emphasis added). Accordingly, the literal terms of the ESA and EPAA provide that a Section 210 action will lie for overcharges in *all sales of crude oil.* In accordance with this statutory mandate to subject all sales of crude oil to regulation, the DOE's regulations provided at 10 C.F.R. § 212.52 as follows:

> The prices charged for any sale of a covered product *by any Federal department, agency or other instrumentality*, including any wholly owned Government corporation . . . and by State and local governments *are subject to the price regulations of this part.* . . .

10 C.F.R. § 212.52 (1981) (emphasis added).

The applicability of the Price Regulations to the federal government, including the DOI, has been repeatedly affirmed in the public pronouncements of Congress and of the DOE[8] and in the decisions of TECA.[9] "To exempt one of the largest sellers of crude oil from the pricing mechanism precluding purchasers from pursuing their statutory remedies for overcharges would be incongruent with [Con-

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[8]*See, e.g.*, Interpretation No. 1975-15, [Compliance Manual] Energy Mgmt. (CCH) ¶ 52,256, at 56,281 (Mar. 20, 1975) ("the Mandatory Petroleum Price Regulations apply uniformly to Federal, State and local governments"); Ruling 1974-22, 3 Energy Mgmt. (CCH) ¶ 16,032 (July 9, 1974); *see also* United States Geological Survey, 5 FEA Energy Mgmt. (CCH) ¶ 80,537, at 80,676-77 (Jan. 26, 1977).

[9]*See* Mohawk Petroleum Corp. v. Department of the Navy, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975) (holding that FEA had statutory authority to regulate sale of crude oil by federal agencies).

gress'] regulatory scheme". *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297, 300 (D. Wyo. 1982).

CONCLUSION

For the foregoing reasons, Lunday-Thagard's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Counsel of Record)
JOHN R. COPE
MARY CAROLINE PARKER
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1825 Eye Street, NW
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(202) 828-5800

Attorneys for Laketon Asphalt Refining, Inc.

Dated: November 22, 1985

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Civil Action No. EV-81-162-C

LAKETON ASPHALT REFINING, INC.,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants.

DEFENDANTS' MOTION TO STAY

Defendants United States Department of the Interior and Donald P. Hodel, Secretary of the Interior, by their undersigned counsel, hereby move to stay plaintiff Laketon Asphalt Refining Inc.'s motion for partial summary judgment pending this Court's resolution of defendants' motion to dismiss. The motion to dismiss argued that claims such as those asserted by plaintiff in its motion for partial summary judgment are barred by sovereign immunity, a position recently affirmed by the Temporary Emergency Court of Appeals in *Lunday-Thagard* v. *DOI*, No. 5-115 (July 26, 1985). Accordingly, this Court is without jurisdiction to rule on plaintiff's motion for partial summary judgment.

Defendants respectfully refer the court to the attached memorandum for a full statement of the grounds for this motion.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

JOHN DANIEL TINDER
United States Attorney

CHARLES GOODLOE
Assistant United States Attorney

STEPHEN E. HART

HAROLD N. ISELIN

Attorneys, Department of Justice
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PETER J. SCHAUMBERG
GEOFFREY R. HEATH
Office of the Solicitor
Department of the Interior
Washington, D.C.

traces the accounting and reporting procedures used by the Survey and concludes at page 21 that under existing procedures, Survey cannot comply with the regulations:

> The report (on upper tier and lower tier oil) is only as accurate as the lessee's figures upon which it is essentially based. These figures reflecting volumes, sale prices, and royalty values of production, are subject to and frequently are corrected by the lessee or by the USGS pursuant to an audit months after delivery of the royalty oil. The Secretary cannot certify in good faith that these are the correct figures; rather, he can only report the best figures he has at the time. This is also why the USGS cannot comply with FEA regulations establishing the 69-day period from the month of production as the date beyond which the Secretary may not collect additional royalty due the United States.

The memorandum, however, also concludes that as an alternative, the Secretary could honor the regulations if the estimated billings to refiners were increased to insure that refiners would never underpay. Under this approach, if the final corrected figures indicated overpayments had been made, refunds could be made to the refiners. It would appear that the existence of this alternative effectively negates the argument that compliance will result in the loss of royalty and thus circumscribe the Secretary's duty. If, however, it was determined that a refiner was entitled to bring suit under § 210 of the Economic Stabilization Act, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754, it is possible that the United States could be held liable for treble damages for intentionally overcharging the refiner. I view this possibility as remote because it has been held in *McCulloch Gas Processing Corporation v.* [*Cancian*] *Hidrogas Resources*, 577 F.2d 712 (TECA 1978) *cert.den.* 439 U.S. 831 (1978) that § 210 does not provide a right of action against the

Government. [A significant] alternative not discussed by the memorandum is whether existing Survey procedures used to verify the lessee's figures could be modified in order to comply with certification requirements. In short, the memorandum does not illustrate that compliance with the regulations is impossible nor that compliance will result in circumvention of the Secretary's statutory duty to collect royalty.

Second, the memorandum states that the Secretary's duty can only be circumscribed by statute and appears to conclude that even if DOE had such authority, it would make no difference. The language at page 22 of the opinion reads:

> Even if the FEA [DOE] had the authority, the FEA [DOE] regulations in this regard are clearly unreasonable and arbitrary as to the United States.

As previously indicated, it is my view that it has not been shown that the regulations circumscribe the Secretary's duty. If it is assumed, however, that the regulations did in fact prevent the Secretary from exercising his duties, the above statement is still questionable. If DOE had clear statutory authority to [alter] the Secretary's duties, the regulations promulgated under this authority would have to be followed. The above statement, however, takes the position that if the regulations are "unreasonable and arbitrary as to the United States" DOE authority is irrelevant. This position infers that the sole test of whether an agency is required to comply with another agency's regulations is whether such regulations are unreasonable and arbitrary. Such inference is not an accurate statement of the law and is not legally supportable. The general rule of statutory construction is that "where there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden*, 308 U.S. 188, 198 (1939). This rule is applicable in this case. While the memorandum illus-

trates that compliance with DOE certification regulations will cause administrative hardship, it does not contain adequate legal or factual justification to show that both DOI and DOE statutory authority cannot be given effect.

Finally, it should be noted that the most recent legislation relating to the question of certification indicates that DOI was required to comply with certification regulations. Section 27(b)(2) of the OCS Lands Act Amendments of 1978, 43 U.S.C. § 1353(b)(2) reads in relevant part:

> (2) Whenever, after consultation with the Secretary of Energy, the Secretary determines that small refiners do not have access to adequate supplies of oil at equitable prices, the Secretary may dispose of any oil which is taken as a royalty to new profit share accruing or reserved to the United States pursuant to any lease issued or maintained under this Act or purchased by the United States pursuant to subsection (a)(2) of this section, by conducting a lottery for the sale of such oil, *or may equitably allocate such oil among the competitors for purchase of such oil, at the regulated price,* or if no regulated price applies, at its fair market value. [Emphasis added].

The term "regulated price" is defined in section 27(e)(1)(A) as the highest price "at which oil [many] [sic] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 and *any rule or order issued under such Act.*" [Emphasis added]. The certification regulations in question were issued under the Emergency Petroleum Allocation Act of 1973, as amended, and it is my view that the Secretary was required to comply with such regulations in the sale of OCS royalty oil to refiners. It can be argued that this statute illustrates that DOI was not required to comply with certification regulations

prior to its enactment. A better view, however, is that it confirms the previously existing intent that DOI comply with certification regulations issued under authority of the Emergency Petroleum Allocation Act of 1973.

In summary, the conclusion of the Solicitor's Memorandum of October 21, 1977 that DOI is not required to comply with DOE certification regulations is not legally supportable. The legal authority of DOI to assess a one-half percent administration charge and to assess royalty on the total price received by producers given DOE price relief is adequately supported by the memorandum.

John E. Kelly
Staff Attorney

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

January 2, 1980

Memorandum

To: Larry McBride
Ken Lee

From: John Leshy

Subject: DOE/USGS Pricing Dispute

Bart Eisenberg, who is in charge of the Enforcement Division at DOE's Economic Regulatory Administration (tele. 254-8740) called me on December 31 to press for a resolution ASAP on the USGS/DOI oil pricing dispute. He says that events are transpiring which means we cannot sit on this issue much longer. DOE is now bringing criminal charges against certain private oil companies for violating DOE's pricing regulations, and the companies are asserting as a defense USGS's pricing behavior. He says, quite reasonably, that the federal government is going to look absolutely terrible and DOE's prosecutions of flagrant behavior by private individuals is going to be hampered by the failure to resolve this issue. USGS and DOE both may well end up with a serious black eye if the situation is not resolved soon.

His view of the merits is that there is no reason why USGS prices should be different from what DOE requires of everyone else. I told him I would call him back Wednesday with a status report on our examination of this issue.

Please advise me by noon on Wednesday what is being done as a follow-up to our meeting of a couple of months ago with the DOE people, and how we can resolve it ASAP.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

7 SEP 1978

EAS:DGL:GLG
106-18-57-723

Honorable Barbara Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Ms. Babcock:

RE: *Mountain Fuel Supply Co. v. U.S. Department of Energy, et al.*, Civil No. 78-0198 (D. Utah)

This is to confirm our oral advice in the above-captioned case that defendants Andrus and the Geological Survey are willing to refund the overcharges the Department of Energy found to have occurred in the sale of oil produced on plaintiff's federal leases in the Dry Piney Field.

Interior Department defendants will make the refunds to the purchasers of the oil from Geological Survey under the royalty oil contracts, Sage Creek and Mountaineer Refineries. With these refunds made, the portion of the DOE order directing plaintiff to refund $44,814.62 to these refineries will become moot, the second and third causes of action in the complaint will become moot, and the case against Interior defendants should be dismissed.

With this accomplished, the potential divergence in views between the two cabinet agencies over the appropriateness of DOE's ordering plaintiff to refund monies for

overcharges on oil plaintiff never owned or sold becomes irrelevant to the case.

Our Regional Solicitor in Salt Lake City will be able to provide you with an affidavit or other evidence from Geological Survey of the refunds to Sage Creek and Mountaineer after those refunds are made. In fact, the "refunds" will probably be made in the form of deductions from current payments due on the royalty oil contracts—no cash need be transferred.

Geological Survey informs us, as the Regional Solicitor indicated in his litigation report, that it has no reason to contest the DOE pricing determination with respect to the value of the federal share of the oil produced from the Dry Piney Field. We conclude that even if the plaintiff's challenge to the DOE pricing determination succeeds, the *lease* contract will not be violated in any way, since the United States elected to receive its royalty in kind rather than in value, and it did receive its royalty percentage in kind, no matter what the lawful value of the production is finally determined to be.

Finally, under Article V of the royalty oil contracts themselves, the price at which the federal oil is sold to the refineries is "the market price," which is tied to the posted price for the field or the value received by the federal lessees for the sale of their share of the production. Thus, the royalty oil refineries would be obligated to repay the refunded amounts should plaintiff prevail in this case and the posted price be established as the lawful "market price" of this production. This fact does not, in our view, jeopardize your defense of DOI's determination, and it is of no relevance to plaintiff's argument. Further, it is not inconsistent with the DOI proceedings, in which Interior was not a party, and DOE's order, which did not run against the United States (as lessor) or Geological Survey as seller of the royalty oil.

We hope these positions will clear the way for dismissal of Interior defendants and the unencumbered defense of the DOE pricing determination.

Sincerely yours

FREDERICK N. FERGUSON
Frederick N. Ferguson
Deputy Solicitor

cc:
Thomas Patton, Esq.
Office of the General Counsel
Department of Energy
12th & Pennsylvania Ave., N.W.
Washington, D.C. 20461
Director, U.S. Geological Survey
Regional Solicitor, Salt Lake City
Attn.: Roland Robison, Esq.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

OCT 30 1978

Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Ms. Babcock:

This is to confirm the recommendation of the Department of the Interior on your Department's proposal to initiate settlement negotiations with the plaintiff in the action entitled *Young Refining Corporation v. U.S. Department of the Interior, et al.*, Civil No. 78-1470, in the United States District Court for the District of Columbia. Our position on the settlement proposal was given (by telephone) by Mr. Lawrence R. Boese, Office of the Solicitor, to Ms. Stephanie L. Golden, of your office, on October 26, 1978.

The bases of initiating settlement negotiations with the plaintiff, were:

1. The Department of Justice believed it was necessary to present one Federal position on the issues raised by the plaintiff,

2. The District Court might rule in plaintiff's favor and either set a "bad precedent", or leave the Departments of Energy (DOE) and Interior (DOI) with a ruling neither would find satisfactory to their interests,

3. The assumption that DOE would be amenable to amending 10 CFR 212.131 (the 60 day price certification

regulation) to 90 or 120 days or whatever was necessary to accommodate DOI's royalty oil program,

4. The assumption that DOI would decide to drop its administrative charge after a process of reconsidering its position of charging refiners for the cost of administering royalty oil sales,

5. The assumption that DOE and DOI would act promptly in amending 10 CFR 212.131 and dropping the administrative fee.

The Departments of the Interior and Energy may decide to stop charging refiners a fee to cover the costs of administering royalty oil sales. We have indicated our willingness to discuss the matter with Energy; however it would be some time before such a decision takes effect.

The amendment of 10 CFR 212.131 by DOE would facilitate the administration of this Department's royalty oil program. However, since the amendment would only have prospective application, the plaintiff in this case, as well as other refiners participating in our royalty oil program, could still file suit against us on the same issues raised in the subject suit, on our administration of other royalty oil contracts in the past. In short, amending 10 CFR 212.131 now would still leave us vulnerable to suits by refiners for our actions taken prior to the regulation's being amended. Thus, the amendment of 10 CFR 212.131, alone, does not remove the possibility of future litigation over the issue of this Department's compliance with that regulation as it presently reads. We believe several millions of dollars of claims by refiners, whose situations are the same as the plaintiff's in this case, may result if the case is settled in favor of Young Refining Corp.

For the reasons stated in this letter, we recommend against commencement of efforts to settle this litigation

until the Departments of the Interior and Energy have agreed on the principles involved.

Sincerely,

FREDERICK N. FERGUSON
Deputy Solicitor

cc:
Docket Section
Solicitor's RF (2)
Secretary's RF (2)
DER RF
DER RF CMIIL
LHoese

SOL:LHoese:hPElliott:ljj 10-30-78 z6325

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 16 1980

Note for Chuck Eddy

From: Pierce Elliott

Subject: Resolution of *Saber Refining*/
Royalty Oil Problem

On Tuesday, May 6, 1980 several of us from the Solicitor's Office met with the Solicitor-Designate to discuss resolution of the *Saber Refining* case and to discuss other problems arising from the USGS Royalty Oil Accounting System. We discussed a range of possible ways to resolve these interrelated problems:

1. *Saber Refining Co. v. Andrus*

a. Ask opposing counsel through Justice for time to allow USGS internally to resolve the problem.

b. Ask Department of Justice as a delaying tactic to adopt a position based on the Schafer-Krulitz memorandum that the Department of the Interior is not bound by the 60-day certification requirement.

c. Urge settlement of the *Saber Refining* case in order to take the immediate pressure off resolving the larger problem of overhauling the USGS Royalty Accounting System. (Counsel for *Saber Refining* have offered to postpone the hearing on the motion to dismiss in order to enter into settlement negotiations).

2. USGS Royalty Oil Accounting System

a. Congressional Assistance

i. Seek a legislative exemption from Department of Energy pricing/(and allocation?) regu-

lations. The Department of Navy was successful in obtaining an exemption from the Department of Energy regulations after the *Mohawk* case.

ii. Seek extra funding for sufficient staffing for current Royalty Oil Accounting System.

b. Urge USGS to bring field people who work with the royalty accounting system to find out if there is not some way to revise the system to avoid conflict with the Department of Energy's regulations.

c. Continue Current Accounting System, but assess payments on fair market value of oil and later adjust the billings downward to reflect the correct price for the oil consistent with Department of Energy pricing regulations.

d. Petition the Department of Energy's Office of Hearings and Appeals for an exemption from the 60-day certification requirement, seeking a 120-day certification period.

This summarizes the alternative courses of action which we discussed and considered to be feasible. It should be noted that none of the proposals are mutually exclusive; a number of the proposals may be utilized in resolving the problems that confront the Department of the Interior.

Meanwhile, subsequent discussions between the Department of Justice attorney who is handling the *Saber Refining* case and Douglas Fant of our office indicate that the Department of Justice will enter into settlement negotiations with Saber Refining. Saber has begun to collect its billings and will submit these to USGS for verification of overcharges. When these steps have been taken, it is possible that we could agree to settle with Saber.

Settling the one case, however, will not solve the underlying problem. It is clear that we cannot expect Justice to continue to defend USGS in future cases. We know already of several more that will soon be initiated. Thus, a solution to the basic accounting problem is badly needed.

We would like to discuss this with you at a meeting tentatively scheduled for 11 a.m., May 19.

cc:
Hillary Oden
Fred Ferguson
John Leshy
John Little
Larry McBride

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

No. MO-84-CA-05

TIPPERARY REFINING COMPANY

vs.

UNITED STATES DEPARTMENT OF INTERIOR

[Filed Oct. 9, 1985]

ORDER

The parties in the above-styled and numbered cause moved for partial disposition of this case through cross motions for summary judgment. Fed. R. Civ. P. 56. This Court heard oral arguments on the merits of the motions on January 29, 1985. Since that time, the Temporary Emergency Court of Appeals handed down its decision in *Lunday-Thagard Company v. United States Department of Interior*, No. 5-115 July 16, 1985. In that case, TECA held that the district court lacked jurisdiction over the claims raised under the Emegency Petroleum Allocation Act, 15 U.S.C. sec. 754 because Congress has not waived its sovereign immunity in that area. The Defendant in its motion contests this Court's jurisdiction over Plaintiff's claims. In accordance with *Lunday-Thagard*, the Court holds that the defendant is correct as to counts

one, two and four raised in Plaintiff's complaint. As such, the Court dismisses the claims in those counts without prejudice.

The remaining claim in Plaintiff's action is that involving transportation charges. TECA in *Lunday-Thagard* held that such a claim is not barred by the doctrine of sovereign immunity. There is a question, however, whether this Court is the proper forum to hear the claim concerning transportation charges. As such, the Court directs the parties to respond in writing within ten (10) days from the date of this Order addressing whether this claim can be heard by this Court or should be heard by the United States Court of Claims.

IT IS SO ORDERED.

SIGNED this 27th day of September, 1985.

/s/ David O. Belew, Jr.
DAVID O. BELEW, JR.
United States District Judge

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-504 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 210(b) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, waives the sovereign immunity of the United States from damages liability that is not based on an alleged taking of property for a public purpose.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-504

LUNDAY-THAGARD COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 773 F.2d 322. The opinion of the district court (Pet. App. 9a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1985 (Pet. App. 1a). On August 7, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 25, 1985. The petition was filed on September 24, 1985. The jurisdiction of this Court is invoked un-

der Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), which incorporates by reference Section 211 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note.[1]

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[1] The petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of ESA, 12 U.S.C. (1976 ed.) 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code * * *.

This judgment of the court of appeals was entered on July 26, 1985, and the petition was not filed until September 24, 1985. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to Temporary Emergency Court of Appeals (TECA) cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980).

STATEMENT

1. The Department of the Interior (DOI) grants oil and gas leases on federally owned lands and offshore properties under the Mineral Lands Leasing Act, 30 U.S.C. (& Supp. I) 181 *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in value or in kind. 30 U.S.C. 192; 43 U.S.C. 1353. If the Secretary elects to take royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 30 U.S.C. 192; 43 U.S.C. 1334; Pet. App. 2a n.1.

Petitioner is a small refiner of crude oil. In 1973 and 1980, petitioner entered into several contracts with the United States, through the United States Geological Survey, a sub-agency of the DOI, to purchase oil produced from offshore and onshore tracts in which the DOI had a royalty interest. During the period prior to January 21, 1981, regulations issued by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, established a complex petroleum pricing structure, which included categories or "tiers" of crude oil as well as maximum prices for each tier. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). In general, "old oil," *i.e.*, oil being produced in volumes less than historic production levels, could be sold at a specified "lower tier" price. By contrast,

"new oil," *i.e.*, oil produced from new sources or from old sources in excess of historic production levels, could be sold at higher "upper tier" rates. Beginning in 1979, certain categories of oil were decontrolled and could be sold at market rates. The regulations required producers to certify to their customers the volumes of oil purchased in each tier within a specified time. 10 C.F.R. 212.72, 212.131 (1979); Pet. App. 2a, 14a-15a.[2] The control of petroleum pricing ended on January 27, 1981. Exec. Order No. 12,287, 46 Fed. Reg. 9909.

2. a. On December 5, 1983, petitioner filed suit in the United States District Court for the Western District of Louisiana. Petitioner alleged that the DOI had sold petitioner oil at a price in excess of the maximum lawful price allowed by the DOE's regulations and sought a "refund" of more than $6 million, as well as treble damages.[3] Petitioner claimed that the DOI's certifications were untimely and allegedly improper in form and therefore that all of the royalty oil that it purchased from the government should be deemed to be "old oil" and sold only at the lower tier price, even if the oil in fact was "new" or "uncontrolled" oil. Petitioner did not allege that the oil that it had purchased did not otherwise qualify for the price category billed by the agency, or that

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[2] The regulatory structure and certification process are comprehensively discussed in *Department of the Interior—Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) ¶ 81,012 (1984).

[3] Approximately 99% of petitioner's damages claim was based on the DOI's allegedly improper certification of the royalty crude oil. The remainder was for allegedly improper administrative fees, surcharges, and transportation charges. See Pet. App. 15a.

petitioner would not have paid the same purchase price had the certifications been timely or in a different form. Pet. App. 3a, 15a. Moreover, petitioner did not allege that it was unaware of the timing or the form of the DOI's certifications when they were received. At no time did petitioner bring any of its claims to the agency's attention and pursue its administrative remedies, as both its contracts with the DOI and the DOI's regulations allowed (see 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4). Petitioner also did not allege that it had reported this supposed violation to the DOE, as the DOE's regulations required. See 10 C.F.R. 212.131(c) (1979). Instead, petitioner took its oil and paid each invoice upon receipt without protest and then waited more than two years after the decontrol of crude oil prices before bringing this suit.

b. On December 4, 1984, the district court dismissed petitioner's complaint on the ground that it was barred by the applicable state limitations period, La. Civ. Code Ann. art. 3536 (West 1953) (Pet. App. 14a-17a).[4] The district court denied petitioner's motion for reconsideration (*id.* at 9a-11a), and petitioner appealed to the Temporary Emergency Court of Appeals.

3. The court of appeals affirmed on the ground that petitioner's claims were barred by sovereign immunity (Pet. App. 3a-8a). Relying upon its prior decision in *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, cert.

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[4] The Temporary Emergency Court of Appeals had previously ruled that the most analogous state statute of limitations should apply to suits brought under the ESA and EPAA, since neither statute contains a federal statute of limitations. *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (1982); cf. *Wilson* v. *Garcia*, No. 83-2146 (Apr. 17, 1985).

denied, 439 U.S. 831 (1978), the court held that Section 210 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, which creates civil remedies for violations of the oil price regulations, does not provide a cause of action against the United States except in takings cases, which this case does not involve (Pet. App. 5a). The court also rejected petitioner's claim that this action could be brought under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491(a)(1), on the ground that Section 211 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, vests exclusive jurisdiction over claims brought under the EPAA in the district courts, not in the Claims Court (Pet. App. 7a). Finally, again relying on *McCulloch*, the court of appeals rejected petitioner's argument that Section 211 creates an exception to the district court's jurisdiction under the Tucker Act (Pet. App. 7a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court denied a petition for a writ of certiorari in *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 439 U.S. 831 (1978), that presented the same question, and nothing has changed since then that warrants different treatment of the petition in this case. Moreover, petitioner has not shown that the district court erred by dismissing petitioner's complaint under the applicable statute of limitations, which provides an independent and adequate basis for the judgment below. Accordingly, there is no reason for this Court to review petitioner's claims.

Petitioner errs in contending (Pet. 16-17) that Sections 210 and 211 of the ESA waive the sovereign

immunity of the United States from the damages claim asserted in its complaint.[5] A waiver of the United States' sovereign immunity must be express and unambiguous. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969). The ESA does not in terms expressly waive the sovereign immunity of the United States; nor does it implicitly have that effect. Section 210 creates a cause of action for a violation of the oil pricing regulations, and Section 211 vests jurisdiction over such claims in the district courts. Although Section 210 provides a cause of action against any "person" who violates the price controls, the court of appeals correctly held (Pet. App. 4a) that this term does not include the United States. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941); cf. *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 11. Moreover, the legislative history of the ESA makes clear that "[t]he Government will not * * * be the subject of" an action under Section 210. S. Rep. 92-507, 92d Cong., 1st Sess. 9 (1971). Lastly, as the court of appeals noted (Pet. App. 4a), Congress's adoption of a treble damages remedy in Section 210(b) "makes it all the more obvious that Congress did not intend by implication to waive sovereign immunity." Accord *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d at 714-718; *id.* at 718-719 (Christensen, J., concurring).[6]

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[5] While nominally brought against the DOI, petitioner's suit is in actuality against the United States, since a judgment in petitioner's favor "would expend itself on the public treasury" (*Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citation omitted)). See 30 U.S.C. (Supp. I) 191; 43 U.S.C. 1338.

[6] None of the district court decisions on which petitioner relies (Pet. 17) cites the legislative history of Section 210

In the alternative, petitioner claims (Pet. 10-14) that it has an independent remedy under the Tucker Act for an "unlawful exaction" or for a breach of contract and that the court of appeals erred by ruling that the ESA implicitly repealed the Tucker Act. That argument is misdirected. In the first place, petitioner's damages claim, however characterized, rests entirely upon its allegation that the DOI violated the DOE's regulations by untimely or improperly certifying the oil that petitioner purchased; petitioner essentially concedes as much (Pet. 8). Petitioner's claim thus necessarily "aris[es] under" the EPAA and the ESA (12 U.S.C. (1976 ed.) 1904 note), and, given the comprehensive remedies established by the ESA (see *McCulloch*, 577 F.2d at 714-718), those remedies are exclusive (see, *e.g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)). Indeed, petitioner could not bring suit in district court if its claim did not "aris[e] under" the EPAA and ESA, because ESA Section 211 does not provide the district courts with jurisdiction to resolve alleged breach of contract or "unlawful exaction" claims. Accordingly, petitioner cannot avoid the fact that its claim is based upon ESA Section 210 simply by recasting that claim as one for a breach of contract.

Furthermore, as the Court explained in *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (citations omitted), "the Tucker Act 'does not create

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discussed by the court of appeals (Pet. App. 4a-5a). In the absence of a conflict among the circuits, the issue does not warrant review by this Court. Additionally, petitioner's claim (Pet. 9) that the United States waived its immunity by engaging in commercial transactions was correctly rejected by the court of appeals (Pet. App. 6a). See *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947).

any substantive right enforceable against the United States for money damages' [,] * * * [and any] substantive right must be found in some other source of law." For the reasons given above, Section 210 " 'can[not] fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (463 U.S. at 217 (citations omitted)). Therefore, petitioner has failed to state a claim for damages that is compensable under the Tucker Act. In any event, petitioner brought suit under the ESA, not the Tucker Act (see Pet. App. 14a). In fact, petitioner could not have brought suit in district court under the Tucker Act, since petitioner's claim exceeded the jurisdictional limitation that the Tucker Act imposes on the district courts. Thus, the Tucker Act by its terms is inapplicable here.[7]

Petitioner erroneously asserts (Pet. 12-13) that the court of appeals' decision conflicts with *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Both decisions simply concluded that later enacted statutes did not withdraw a Tucker Act remedy that was otherwise available for allegedly unconstitutional takings of property. *Ruckelshaus* v. *Monsanto Co.*, slip op. 28-30; 419 U.S. at 134-136. Because the ESA does not provide petitioner with a cause of action against the United States, petitioner has no remedy that can be enforced under the Tucker Act. For the same reason, *Hatzlachh Supply Co.* v.

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[7] Petitioner's claim (Pet. 11) that the ESA impliedly modified the Tucker Act by allowing suit to be brought in any district court is flawed. Petitioner has failed to identify anything in the text or legislative history of the ESA demonstrating a " 'clear and manifest' " congressional intent to repeal the Tucker Act's jurisdictional limitations (*Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (citation omitted)).

United States, 444 U.S. 460 (1980), does not support petitioner's argument. *Hatzlachh* simply held that the Federal Tort Claims Act exemptions did not withdraw a party's preexisting remedies under the Tucker Act. The question here, however, is whether petitioner had a cause of action under the ESA to begin with. Nor does the court of appeals' decision conflict with *United States* v. *Mitchell*, *supra*. *Mitchell* expressly noted that "[n]ot every claim invoking * * * a federal statute * * * is cognizable under the Tucker Act" (463 U.S. at 216) and that "[a] claimant must demonstrate that the source of substantive law he relies upon" requires compensation (*id.* at 216-217). The court of appeals correctly held that a claim based on the ESA is not a claim that requires the United States to pay compensation and thus cannot be presented under the Tucker Act.[8]

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[8] Petitioner also errs in claiming (Pet. 11) that the decision below conflicts with *Munoz* v. *Small Business Administration*, 644 F.2d 1361 (9th Cir. 1981); *Mar* v. *Kleppe*, 520 F.2d 867 (10th Cir. 1975); *Robinson* v. *United States*, 551 F. Supp. 1120 (M.D. La. 1982); and *Selected Risks Insurance Co.* v. *Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976). These cases held that the Small Business Administration (SBA) can be sued in district court, not the Court of Claims, for damages in excess of $10,000 because 15 U.S.C. 634(b)(1) expressly provides that the SBA may be sued in any court. The decision below also does not conflict with *Mohawk Petroleum Corp.* v. *Department of Navy*, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975). As the court of appeals noted (Pet. App. 5a), that decision did not present any question whether the United States had waived its sovereign immunity from damages liability. In any event, any intracircuit conflict is for the court of appeals to resolve, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner's alternative suggestion (Pet. 13-14)—that this suit should be transferred to the Claims Court—should also

Finally, review by the Court is also unwarranted because the question presented by petitioner is largely of historical, not current, importance. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Moreover, the DOE is likely to correct any technical defect in the DOI's certification forms by retroactively granting the DOI an exemption from the applicable requirements; in fact, the DOE has already done so on an identical claim. *Department of the Interior—Laketon Asphalt Refining, Inc.* 12 Energy Mgmt. (CCH) ¶ 81,012 (1984).[9] The DOI has filed an exception application with the DOE that would apply to the DOI's sales to petitioner. Accordingly, petitioner's claims, which are based upon purely technical defects in the DOI's certification forms and which involve regulations no longer in effect, do not warrant review by this Court.[10]

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be rejected. As the court of appeals noted (Pet. App. 7a), the Court of Claims (whose decisions are binding on the Federal Circuit, see *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982)) has held that Section 211 of the ESA provides the district courts with exclusive jurisdiction over Section 210 claims. *The Poole & Kent Co.*, 214 Ct. Cl. 836 (1977); *Metsch* v. *United States*, 493 F.2d 1232 (Ct. Cl. 1974). That ruling is consistent with the court of appeals' holding in this case. Accord *Municipal Elec. Util. Ass'n* v. *FPC*, 485 F.2d 967, 970 (D.C. Cir. 1973); *Municipal Intervenors Group* v. *FPC*, 473 F.2d 84, 88-91 (D.C. Cir. 1972).

[9] Review of that decision has been sought in *Laketon Asphalt Refining, Inc.* v. *DOE*, Civ. No. EV 84-264-C (S.D. Ind.).

[10] Amici erroneously claim (Howell Amicus Br. 7-8) that Congress waived the government's sovereign immunity in the Federal Oil and Gas Royalty Management Act of 1982

(FOGRMA), 30 U.S.C. 1701 *et seq.*, in two ways: by declining specifically to exempt the DOI from suits brought under the ESA, and by adopting an accounting procedure under which the states would be charged a pro rata share of any overcharge award entered against the government (30 U.S.C. 1721(e)). Both claims are mistaken. Congress declined to adopt a specific exemption for the DOI because the DOI's proposal was beyond the scope of the legislation under consideration, not because Congress intended to waive sovereign immunity. S. Rep. 97-512, 97th Cong., 2d Sess. 20 (1982). The legislative history of 30 U.S.C. 1721(e) also makes clear that this provision does not waive sovereign immunity. See 128 Cong. Rec. S13939-13940 (daily ed. Dec. 6, 1982) (section-by-section analysis by Sen. McClure, Chairman of the Committee on Energy and Natural Resources, which had reported the bill) ("[t]his provision is designed solely to avoid any hardship for the States. It is not intended to be a waiver of the Federal government's immunity against suits for overcharges or other alleged violations of the mandatory price and allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, as amended."). Third, as the DOE noted in *Laketon*, at most Congress declined to exempt the DOI from *substantive* violations of the ESA, not formalistic ones. Here, as in *Laketon*, the overcharge claim "relates only to the *timing* and other formalistic aspects of [the DOI's] certifications, not to their substantive validity" (*Department of the Interior-Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) at 82,557 (emphasis in original)). In any event, petitioner did not allege in its complaint that the DOI had violated this statute.

Amici also erroneously assert (Howell Amicus Br. 2, 13-15); Laketon Amicus Br. 7) that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, apply to this case. OCSLA applies only to offshore oil, and 43 U.S.C. 1349(a)(1) does not repeal ESA Sections 210 and 211 in this respect. Rather, that provision only authorizes injunctive relief and only for an alleged "violation of any provision of this subchapter * * *" or its implementing regulations. The provision does not waive the sovereign immunity of the United States from damages liability. When Congress intended to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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waive the United States' sovereign immunity from damages, Congress did so in express terms. See 43 U.S.C. 1352(f)(1) (revelation of information in violation of confidentiality regulations allows affected party to "commence a civil action for damages in the appropriate district court * * * against the Federal Government * * *"). There is no analogous waiver here.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

REPLY OF LUNDAY-THAGARD COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In its Petition, Lunday-Thagard demonstrated that the ruling below was in direct conflict with four recent decisions of this Court, all of which construe the interrelationship of the Tucker Act with other federal statutes. Because the Tucker Act is the broadest waiver of sovereign immunity enacted by Congress, the issues raised by this petition are of far reaching significance.

This case arose out of the Department of the Interior's agreement to comply with the Department of Energy's price control regulations, its breach of that agreement, and its efforts to retain the money it received as a result of that breach. Rather than addressing the arguments raised in the Petition, Interior now seeks, in addition,

to dissuade this Court from reviewing the decision below by mischaracterizing both Petitioner's position and the Economic Stabilization Act, as well as by altering its litigation position to suit its purposes, *i.e.*, by advancing a position in this Court that is at variance with that previously advanced in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").[1]

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[1] The government suggests that the Petition "appears to be jurisdictionally out of time." Brief in Opposition (Br. in Opp. at 2, n. 1). This suggestion is without merit. Judgment was entered July 26, 1985, and one week later, on August 2, 1985, Lunday-Thagard applied to the Chief Justice for a thirty-day extension of time in which to file its Petition. That application was granted on August 7, 1985. While § 211(g) of the ESA, 12 U.S.C. § 1904 note (1976), authorizes the filing of a petition for a writ of certiorari within thirty days after entry of judgment, this Court is authorized by 28 U.S.C. § 2101(c) (1982) to extend the time for filing a petition for up to 60 days, and nothing in the ESA or its legislative history repeals that authority. *See* S. Rep. No. 92-507, 92d Cong., 1st Sess. 12 (1971); H.R. Rep. No. 92-714, 92d Cong., 1st Sess. 8 (1971); S. Rep. No. 92-579, 92d Cong., 1st Sess. 20-21 (1971). In these circumstances, we submit that the Chief Justice, acting on behalf of the Court, has not exceeded his authority in granting Lunday-Thagard an extension of time. The government's suggestion that authority to extend the thirty-day ESA deadline would defeat the purpose of that deadline is plainly incorrect. The maximum time for filing a petition (including extensions) has been shortened by 60 days, and this Court, of course, can deny any requests for extension if there is a reason for more expeditious treatment of a case. The government has not even attempted to make a showing here, nor did the government oppose Lunday-Thagard's application. If, however, this Court should find that the Chief Justice lacked the authority to grant an extension of time, we respectfully submit that Lunday-Thagard's Application for Extension of Time, filed on August 2, 1985, be deemed the Petition for Certiorari, and that Lunday-Thagard's Petition, filed September 24, 1985 (60 days after entry of judgment) be deemed a supplement to that Petition.

A. The Tucker Act Waives Sovereign Immunity For Claims Involving Unlawful Exaction, Breach Of Contract, And Violation Of A Federal Statute Or Regulation

Because this Court ruled, in *Mitchell II*, that the Tucker Act provides the necessary waiver of sovereign immunity for a damage action based upon claims within the scope of that statute, Lunday-Thagard's Petition never asserted that the Economic Stabilization Act ("ESA") waived sovereign immunity. Rather, Lunday-Thagard demonstrated that its complaint alleged jurisdiction under, *inter alia*, the Tucker Act for unlawful exaction, breach of contract and violation of federal statutes and regulations. The government never seriously addresses this point. Rather, as its primary argument, the government addresses an argument Lunday-Thagard did *not* make: "Petitioner errs in contending . . . that Section 210 and 211 of the ESA waive the sovereign immunity of the United States from the damages claim asserted in its complaint." (Br. in Opp. at 6-7. *See also id.* at (1) "Question Presented").

1. *Breach of Contract and Unlawful Exaction*

The government has attempted to brush-aside Petitioner's Tucker Act claims for unlawful exaction and breach of contract—claims that are separate and distinct from any claims under the ESA. This is understandable in light of the fact that the Solicitor General has previously acknowledged that claims for unlawful exaction and breach of contract fall within the Tucker Act's waiver of sovereign immunity. *See* Brief of the United States in *Mitchell II* (No. 81-1748 at 8, 19, 24, 30). Because the government cannot seriously dispute that the Tucker Act waives sovereign immunity for unlawful exaction and breach of contract claims, the government attempts to deny their presence in this case by contending that "petitioner's damages claim, however characterized, rests entirely upon its allegation that the DOI violated the DOE's regulations. . . .'

(Br. in Opp. at 8). It is undisputed, however, that Interior *contractually* obligated itself to comply with those regulations. Accordingly, its failure to comply with those regulations is plainly a breach of contract. We submit that regardless of whether Petitioner may recover for Interior's regulatory violations, the Tucker Act has waived sovereign immunity for Petitioner's breach of contract and unlawful exaction claims. The failure of the Court of Appeals to recognize this amounts to a ruling that Petitioner's Tucker Act remedies have been repealed by implication.[2] This constitutes more than sufficient grounds for review and reversal.

2. *Violations of Federal Statutes and Regulations*

Petitioner has also asserted an independent claim, under the Tucker Act, based upon Interior's violations of federal statutes and regulations. Thus, the ESA is relevant to this action not as a waiver of sovereign immunity, but rather as a statute providing the substantive right to recover, under the Tucker Act, for violation of a federal statute. As this Court unequivocally held in *Mitchell II*, it is the Tucker Act that provides the necessary waiver of sovereign immunity for ESA claims, just as it does for contract and unlawful exaction claims. The dispositive nature of the *Mitchell II* holding has been recognized by the district courts that have denied motions to dismiss other actions against Interior for overcharges. One such opinion, which analyzed the issue in depth, stated:

> The threshold question here, then, is not whether the private right of action section in the [ESA] provides an express waiver of sovereign immunity, but whether [plaintiff's] claims fall within the Tucker

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[2] The government's only response to this issue is the circular argument that "[b]ecause the ESA does not provide petitioner with a cause of action against the United States, petitioner has no remedy that can be enforced under the Tucker Act." (Br. in Opp. at 9). This argument is plainly inconsistent with *Mitchell II*.

> Act category. Because [plaintiff] is asking for monetary damages based upon the DOI's violations of regulations promulgated pursuant to the EPAA, there can be no dispute that [plaintiff] has asserted a damage claim against the United States that is founded on an Act of Congress and on executive regulations. [Plaintiff's] claims fall squarely within the Tucker Act category, and the United States has presumptively consented to be sued.

Wesreco v. United States Department of Interior, 618 F. Supp. 562, 569 (D. Utah 1985). In analyzing the ESA solely from the standpoint of whether it waives sovereign immunity, the government has simply failed to acknowledge the *Mitchell II* decision and the change in the law resulting from that decision.

This is dramatically illustrated by the government's contention that "[t]his Court denied a petition for a writ of certiorari in *McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd.*, 439 U.S. 831 (1978), that presented the same question, and *nothing has changed* since then *that warrants different treatment of the petition in this case.*" (Br. in Opp. at 6) (emphasis added). There has been a fundamental and profound change since the *McCulloch* decision, however. The *McCulloch* decision relied very heavily upon the very language in *United States v. Testan*, 424 U.S. 392 (1976), that was expressly overruled in *Mitchell II*. As explained in *Wesreco v. United States Department of the Interior*, *supra*, 618 F. Supp. at 571:

> There is no doubt that the *Griffin-McCulloch* line is explicit progeny of *Testan*. And in *Mitchell II*, the Supreme Court expressly stated that any language in *Testan* suggesting that the Tucker Act does not serve as a broad waiver of sovereign immunity "should be disregarded."

Thus, the question of whether the ESA waives sovereign immunity has been rendered totally irrelevant by *Mitchell II*. As a result, the various arguments advanced by the

government regarding *why* the ESA does not waive sovereign immunity are also irrelevant.

In any event, the government's contentions concerning the ESA are simply incorrect. Indeed, in an effort to bolster its ESA argument, the government resorts to a mischaracterization of that statute claiming that "[a]lthough Section 210 provides a cause of action against any 'person' who violates the price controls, the court of appeals correctly held . . . that this term does not include the United States." (Br. in Opp. at 7). This statement simply is not true. Section 210(a), which provides a right of action for damages for violation of the price control regulations, does not use the word "person" in specifying who may be sued.[3]

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitation in section 211), and/or damages.

The government also cites one sentence in the Senate Report of the ESA for the proposition that the government will not be the subject of an action under Section 210. (Br. in Opp. at 7). Because Section 210 is unambiguous, resort to legislative history is inappropriate here.[4] In any event, nothing in this isolated passage of legislative history evidences any intent by Congress to allow the Department of the Interior to evade its *contractual* obligations, to repeal existing Tucker Act rem-

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[3] While Section 210(b) of the Stabilization Act does use the term "person" in the context of a defendant, the reference is to the trial court's discretion to award attorneys' fees, costs and treble damages.

[4] The full quote, moreover, reveals, that, at the very most, this statement in the Senate Report applied only to recovery of treble damages. *See* S. Rep. No. 92-507, 92d Cong., 1st Sess. 1971, U.S. Code Cong. & Admin. News 2283, 2291.

edies and to leave parties who do business with a government agency with no remedy at all for breach of contract. As this Court has stated:

> In such case . . . "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history points somewhat more strongly in another way.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974).

B. The Outer Continental Shelf Lands Act Provides An Independent Waiver of Sovereign Immunity

Even if a waiver of sovereign immunity, in addition to the Tucker Act, is required, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* which was also asserted as a basis for jurisdiction in Lunday-Thagard's complaint, provides such a waiver. That statute requires sales of royalty oil, such as those that were made to Lunday-Thagard, to be made "at the regulated price." 43 U.S.C. § 1353(b)(2). The term "regulated price" is defined in the Act as the highest price at which crude oil may be sold pursuant to DOE regulations. 43 U.S.C. § 1353(e)(1)(A). The Act further authorizes the commencement of a civil action "against any person, including the United States . . . for any alleged violation of any provision of this subchapter. . . ." 43 U.S.C. § 1349(a)(1). For the most part, the government has simply ignored OCSLA. While the government contends that only injunctive relief is available against the United States (Br. in Opp. at 12 n. 10), it cites no authority for this proposition. We are aware of no such authority that conflicts with the plain language of the statute.[5]

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[5] The government mischaracterizes the point made by Amici Howell *et al.* regarding the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1701 *et seq.* The point

C. The Government Has Resorted To Defenses On The Merits, In Tacit Recognition That Sovereign Immunity Does Not Bar Lunday-Thagard's Claim

Knowing that this action is not barred, the government has advanced defenses on the merits as grounds for the denial of certiorari. These defenses are for the trial court to address in the first instance. They are, in any event, without merit.

1. *The "Technical Violation" Defense*

While, the government repeatedly refers to Petitioner's claims as involving "technical defect[s]" (Br. in Opp. at 11), and nonsubstantive "formalistic" violations (Br. in Opp. at 12, n. 10. *See also id.* at 4-5), the government never addresses TECA's finding that while there is no remedy, "Plaintiff presents a claim of injury which on its face appears to call for a remedy." (Pet. App. at 8a).

Indeed, in cases involving the very violations alleged here, TECA has squarely rejected the defense that these violations are "only technical violations." *Johnson Oil v. DOE*, 690 F.2d 191, 201 (TECA 1982). In any event, the amount of any damages resulting from Interior's violations is a question for the trial court. The issue here is whether Petitioner is entitled to have that issue determined by the trial court.

2. *The Exception Relief Defense*

The government contends that the issues raised by Lunday-Thagard will disappear because "the DOE is likely to correct any technical defect in the DOI's certification forms by retroactively granting the DOI an exemption from the applicable requirements. . . ." (Br.

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made by Amici was that Interior had proposed a section to that Act that would have immunized Interior retroactively from its violations of the DOE price regulations. *See* Amici Brief of Howell *et al.* at 7-8, Petition at 17, n. 4. Thus, if Interior was truly immune from liability for price control violations, it would not have been necessary for Interior to have sought such amnesty.

in Opp. at 11). This "exemption" will not "correct" anything, because the grant of an exemption, or exception, pursuant to 10 C.F.R. § 205.50, does not oust a district court from jurisdiction to decide a damage action brought under Section 210 of the ESA. *See Bulzan v. Atlantic Richfield Company*, 620 F.2d 278 (TECA 1980). Moreover, it is far from clear that DOE even has the statutory authority to grant exception relief five years after decontrol. This issue is pending in *Laketon Asphalt Refining, Inc. v. DOE*, Civ. No. EV84-264-C (S.D. Ind.); *Howell Corporation v. DOE*, Civ. No. 85-3112 (D.D.C. Oct. 23, 1985), *app. pending* TECA No. DC-107.[6]

Finally, however, the grant or nongrant of retroactive exception relief does not detract from the "current importance" of this case (Br. in Opp. at 11). The Department of the Interior, which is one of the largest sellers of oil, gas, coal, timber and other such products, has urged dismissal of non-ESA cases on the basis of TECA's decision in the instant case. *See* Petition at 9-10, n.3.

In sum, it is evident that Interior is attempting to utilize the decision below to evade this Court's ruling in *Mitchell II*. This Court must review the decision below because of its inconsistency with *Mitchell II*, *The Regional Rail Reorganization Cases* and the other cases discussed in the Petition.[7]

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[6] It is presumptuous, to say the least, for Interior to predict the outcome of a DOE adjudicatory administrative proceeding concerning Interior's Application for Exception Relief. One of the grounds for Laketon's challenge to the grant of exception relief is bias. As alleged by Laketon, Donald Hodel, formerly Deputy Secretary of the Interior, led the unsuccessful fight for retroactive legislative amnesty. Mr. Hodel thereupon became Energy Secretary and, in the *Laketon* case, granted Interior the very amnesty Congress had refused to grant. Lunday-Thagard has raised these same issues in opposing Interior's request for exception relief in its own case.

[7] The government contends that the district court's ruling on statute of limitations "provides an independent and adequate basis

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in Lunday-Thagard's Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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for the judgment below." (Br. in Opp. at 6). This contention is demonstrably without merit. The district court dismissed the action as time barred, ruling that the Louisiana one-year prescription barred Lunday-Thagard's action (Pet. App. at 9a-17a). 28 U.S.C. § 2401(a) provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

This six year limitation period is "definitive." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946); *Saffron v. Department of the Navy*, 561 F.2d 938, 941, n. 17 (D.C. Cir. 1977). This is true even where a shorter limitation period would apply to identical proceedings involving private parties. *Eastern Freightways, Inc. v. United States*, 257 F.2d 703 (2d Cir. 1958); *Poindexter v. United States*, 647 F.2d 34 (9th Cir. 1981); *Young v. United States*, 184 F.2d 587 (D.C. Cir. 1950). The government's reliance on *Johnson Oil Co. v. DOE*, 690 F.2d 191 (TECA 1982) (Br. in Opp. at 5, n. 4), is misplaced. The *Johnson* case (notwithstanding its caption) was a suit between private parties—not an action against the United States. It is, therefore, beyond dispute that the six year statute of limitations set forth in 28 U.S.C. § 2401(a) governs this action.